

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
SOUTH CAROLINA ELECTRIC & GAS)	Docket Nos. 52-027 and 52-028
COMPANY AND SOUTH CAROLINA)	
PUBLIC SERVICE AUTHORITY (ALSO)	March 9, 2009
REFERRED TO AS SANTEE COOPER))	
)	
(Virgil C. Summer Nuclear Station, Units 2)	
and 3))	
)	

**SOUTH CAROLINA ELECTRIC & GAS COMPANY BRIEF IN OPPOSITION TO
SIERRA CLUB AND FRIENDS OF THE EARTH APPEAL FROM LBP-09-2**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.311(b), South Carolina Electric & Gas Company (“SCE&G”) submits this brief in opposition to the Notice of Appeal and Brief on Appeal (“Appeal”) filed by Sierra Club and Friends of the Earth (collectively, “Petitioners”),¹ of the February 18, 2009 Order (Ruling on Standing and Contention Admissibility), issued by the Atomic Safety and Licensing Board (“Board”) (“Order” or “LBP-09-2”). In its February 18th Order, the Board denied the “Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth” (“Petition”), filed on December 9, 2008. On February 27, 2009, Petitioners appealed the Board’s decision, asking the Commission to overturn the Board’s Order and grant their Petition.

¹ Notice of Appeal of Sierra Club and Friends of the Earth (Feb. 27, 2009); Brief on Appeal of Sierra Club and Friends of the Earth (Feb. 27, 2009).

As discussed more fully below, the Board properly denied the Petition because it did not set forth an admissible contention as required by 10 C.F.R. § 2.309(f)(1). The Board also correctly found that Friends of the Earth (“FOE”) failed to demonstrate standing to participate in this proceeding pursuant to 10 C.F.R. § 2.309(d). Accordingly, the Commission should deny the appeal and affirm the Board’s decision.

II. PROCEDURAL HISTORY

On March 27, 2008, SCE&G submitted an application to the U.S. Nuclear Regulatory Commission (“NRC”) for a combined license (“COL”) for Virgil C. Summer Nuclear Station (“VCSNS”) Units 2 and 3. A Hearing Notice, published in the *Federal Register* on October 10, 2008,² stated that any person whose interest may be affected by this proceeding and who may wish to participate as a party had to file a petition for leave to intervene within 60 days (*i.e.*, by December 9, 2008), in accordance with 10 C.F.R. § 2.309.³

On December 9, 2008, Sierra Club and FOE timely filed a joint Petition. The Petition, accompanied by five declarations in support of Petitioners’ showing of standing,⁴ proposed three contentions.⁵ Both SCE&G and the NRC Staff, in their respective Answers, pointed out that FOE failed to demonstrate standing, and opposed the Petition on the grounds that the Petitioners

² Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 60,362 (Oct. 10, 2008) (“Hearing Notice”).

³ *Id.* at 60,363.

⁴ See Declarations of Thomas W. Clements (“Clements Declaration”), Susan Corbett (“Corbett Declaration”), Pamela Greenlaw (“Greenlaw Declaration”), Leslie A. MinerD (“MinerD Declaration”), and Meira Maxine Warshauer (“Warshauer Declaration”).

⁵ An additional declaration in support of Proposed Contention 3 accompanied the Petition. Declaration of Nancy Brockway in Support of Petition for Intervention and Request for Hearing by the Sierra Club and Friends of the Earth (Dec. 9, 2008) (“Brockway Declaration”).

failed to proffer an admissible contention.⁶ On January 12, 2009, Petitioners filed a Reply to the SCE&G and NRC Staff Answers.⁷

In its February 18, 2009 Order, the Board denied the Petition because Petitioners failed to submit an admissible contention.⁸ The Board also found that FOE failed to demonstrate standing to participate in this proceeding.⁹ On February 27, 2009, Petitioners appealed LBP-09-2 to the Commission. SCE&G hereby opposes Petitioners' Appeal.

III. STANDARD OF REVIEW

“An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.”¹⁰ In ruling on such an appeal, however, the Commission gives “substantial deference” to Board determinations on standing and contention admissibility.¹¹ Thus, “the Commission affirms Board rulings on admissibility of contentions if the appellant ‘points to no error of law or abuse of discretion.’”¹²

⁶ 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) (“NRC Staff Answer”).

⁷ Reply by Sierra Club and Friends of the Earth (Jan. 12, 2009) (“Reply”). SCE&G filed a Motion to Strike portions of Petitioners’ Reply that impermissibly included new arguments and support not found in the Petition. *See* South Carolina Electric & Gas Company’s Motion to Strike Portions of Sierra Club and Friends of the Earth Reply (Jan. 22, 2009) (“Motion to Strike”). In its Order, the Board denied the Motion to Strike as moot. LBP-09-2, slip op. at 28.

⁸ LBP-09-2, slip op. at 2, 28.

⁹ *Id.* at 2, 4, 28.

¹⁰ 10 C.F.R. § 2.311(c).

¹¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

¹² *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-04-36, 60 NRC 631, 637 (2004) (*quoting Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)).

Abuse of discretion is a “high standard of review.”¹³ A petitioner has a “heavy burden” on appeal to establish that reversal of a Board decision is warranted.¹⁴ Furthermore, consistent with this standard, “[t]he appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”¹⁵

In performing its appellate review role, the Commission will not consider “new arguments or new evidence supporting the contention[s], which the Board never had an opportunity to consider.”¹⁶ Raising new issues on appeal is especially inappropriate when “the issue and factual averments underlying it could have been—but were not—timely put before the Licensing Board.”¹⁷

As discussed in detail below, Petitioners not only fail to point to any error of law or abuse of discretion in the Board’s decision, but also raise new issues for the first time on appeal. Therefore, their Appeal should be denied, and the Board’s Order affirmed.

IV. PETITIONERS MISCHARACTERIZE THE STANDARDS GOVERNING CONTENTION ADMISSIBILITY AND IDENTIFY NO ERROR OF LAW OR ABUSE OF DISCRETION

From the outset, Petitioners’ Brief is fatally flawed as it continues to mischaracterize the *correct* legal precedents governing admissibility of contentions in NRC proceedings. Namely, in their Brief, Petitioners recognize that under 10 C.F.R. § 2.309(f)(1), a hearing request “must set

¹³ *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 718 (2006).

¹⁴ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-918, 29 NRC 473, 482 (1989).

¹⁵ *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

¹⁶ *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (citations omitted).

¹⁷ *See P.R. Elec. Power Auth.* (N. Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981).

forth with particularity the contentions sought to be raised.”¹⁸ They also acknowledge the six standards set forth in 10 C.F.R. § 2.309(f)(1)(i) through (vi).¹⁹ However, in interpreting these standards, Petitioners rely on the Appeal Board’s outdated decision in *Peach Bottom*, incorrectly summarizing the pleading and basis requirements in 10 C.F.R. § 2.309(f)(1) as follows:

(1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.²⁰

Petitioners go on to claim that “the NRC Staff, SCE&G and the Licensing Board misapprehend these requirements, generally, where they insist on a dispositive standard of proof for a contention or its bases, rather than the appropriate pleading and basis standard appropriate at this stage of the proceeding.”²¹

Let us be clear. Despite the explicit arguments presented in SCE&G’s Answer to their Petition, highlighting the very *fundamental* changes in the threshold for the admissibility of contentions that have occurred since the *Peach Bottom* era,²² Petitioners persist in what appears to be a purposeful failure to acknowledge and confront the *current* state of the law.²³

¹⁸ Appeal at 7.

¹⁹ Appeal at 7-8.

²⁰ Appeal at 8 (*citing Phila. Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3)*, ALAB-216, 8 AEC 13, 20-21 (1974); *Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3)*, LBP-91-19, 33 NRC 397, 400 (1991)).

²¹ Appeal at 9.

²² See SCE&G Answer at 10-11.

²³ It is unacceptable for a petitioner to turn a blind eye to such a fundamental and pervasive change in agency jurisprudence—one that has now existed for some *twenty years*. Such blatant and persistent mischaracterization of the state of the law is misleading and wasteful of the resources of the Commission, the NRC Staff, and the applicant. *Cf.* Fed. R. Civ. P. 11 (authorizing sanctions for claims that are not “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law”). This disregard for Commission requirements is further illustrated by the fact that, notwithstanding SCE&G’s reference to counsel for Sierra Club’s failure to file a notice of appearance as called for by 10 C.F.R. § 2.314(b), such notice still has not been provided. See Motion to Strike at 1 n.1.

The Commission's criteria regarding contentions, starting with the 1989 amendment to the contention standards, "overrules, or at least supersedes, *Peach Bottom* by raising the threshold requirements."²⁴ Under the current regulations, as amended in 2004, a petitioner must satisfy the other five admissibility criteria in addition to satisfying the basis requirement in 10 C.F.R. § 2.309(f)(1)(ii). Thus, Petitioners' argument about the basis requirement flies in the face of the fact that the contention admissibility rules are "*strict by design*" and were further "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"²⁵ In LBP-09-2, the Board properly relied on the applicable, current requirements to reject all of Petitioners' proposed contentions.

In addition, Petitioners generally muse and opine about what they believe should be the driving purpose of the contention admissibility rules, *e.g.*, "to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against."²⁶ "Mere 'notice pleading' is insufficient" under NRC's current contention admissibility rules.²⁷ Petitioners' conclusory statements²⁸ are insufficient to satisfy Petitioners' responsibility to "clearly identify[] the errors in the decision below and ensur[e] that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."²⁹

²⁴ *Palo Verde*, LBP-91-19, 33 NRC at 400.

²⁵ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (emphasis added) (citation omitted).

²⁶ Appeal at 8.

²⁷ *Fansteel, Inc.* (Muskogee, Okla., Site), CLI-03-13, 58 NRC 195, 203 (2003).

²⁸ See Appeal at 9 ("The three contentions submitted by Sierra and FoE amply meet these requirements; raise significant safety and environmental issues supported by substantial information and expert opinion; are material to the NRC's licensing decision and should be admitted for adjudication.").

²⁹ *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med. Sys.* CLI-94-6, 39 NRC at 297).

In short, there is absolutely nothing in the Petitioners' discussion of the legal standards governing contention admissibility which suggests that the Board committed any error of law or abuse of discretion. To the contrary, Petitioners' reference to outdated contention admissibility standards fundamentally undercuts their arguments on the Board's contention admissibility decision, as further discussed in Section V below.³⁰

V. PETITIONERS HAVE IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION IN THE BOARD'S RULING ON ADMISSIBILITY OF THE PROPOSED CONTENTIONS

A. Proposed Contention 1 (AP1000 Deficiencies)

In Proposed Contention 1, Petitioners claimed that SCE&G's COLA is incomplete because the application adopts Revision 16 of the AP1000 Design Control Document ("DCD"), which is no longer being reviewed by the NRC following the submission of Revision 17 by Westinghouse.³¹ Thus, Petitioners concluded that the COLA "cannot be reviewed without the full disclosure of all designs and operational procedures."³²

³⁰ On appeal, Petitioners also contend that the Board incorrectly concluded that FOE failed to demonstrate standing to participate in this proceeding pursuant to 10 C.F.R. § 2.309(d). This issue is of no practical consequence here because, as demonstrated below, the Board correctly found that Petitioners failed to submit an admissible contention. Nevertheless, Petitioners have not demonstrated a legal error or an abuse of discretion in the Board finding that "[n]one of the affidavits from individuals living in the vicinity of the Summer site, submitted with the original Petition to Intervene and all of which are in substantially the same form, makes any mention of FOE or states that FOE is authorized to represent the affiant's interests." LBP-09-2, slip op. at 4 n.18. Indeed, the Commission has held that "[t]he failure . . . to provide proof of authorization . . . precludes [the petitioners] from qualifying as intervenors." *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 410 (2007). The declarations of Mr. Clements and Ms. Miner were simply lacking anything resembling proof that FOE was authorized to represent their interests in this proceeding. Likewise, Petitioners fail to point to a legal error or an abuse of discretion in the Board's rejection of Petitioners' attempt to cure these failures through supplemental declarations filed with the Reply because, as the Board explained, "it 'is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective pleading with fresh details offered for the first time in [its reply].'" LBP-09-2, slip op. at 5 (*citing Entergy Nuclear Operations, Inc. & Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, slip op. at 5 (Aug. 22, 2008) (*citing* Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (Final Rule))). Even if it was within the Board's discretion to consider the new information in the supplemental declarations, Petitioners provide no indication why the Board's decision not to do so was an *abuse of discretion*, as required by the Commission's substantial deference standard.

³¹ Petition at 12-13.

³² *Id.*

On appeal, Petitioners have not claimed that the Board erred in finding that Proposed Contention 1 fails to adequately allege omission of any *safety-related* analysis. Instead, Petitioners insist that Proposed Contention 1 “is a ‘classic’ contention of omission” because the COLA “fails to demonstrate the fulfillment of two necessary *procedural steps*”—namely, final approval of the design certification through rulemaking and then SCE&G’s adoption of that final design.³³ Thus, Petitioners declare that a COLA “that references un-certified design elements is therefore deficient as a matter of law with respect to its omission of information regarding the certification of those components.”³⁴ At bottom, without pointing to any error or abuse of discretion on the part of the Board, Petitioners simply restate—in part—the very arguments propounded in their original Petition.³⁵

The Board properly concluded that, as a contention of omission, Proposed Contention 1 fails to establish a genuine dispute of material fact or law.³⁶ In the case of an alleged failure to include relevant information required by law (*i.e.*, an omission), a petitioner must identify “each failure and the supporting reasons for the petitioner’s belief.”³⁷ Petitioners did not satisfy this requirement. Significantly in this regard, the Board correctly found that SCE&G “provided an exhaustive list in Attachment 2 to its Answer explicitly addressing where in the COLA each asserted omitted matter is, in fact, addressed, and Petitioner has not contradicted a single item in

³³ Appeal at 10-11 (emphasis added). This argument ignores the very case law quoted in Petitioners’ Appeal. In the *Shaw AREVA MOX* proceeding, the Board explained that a “contention of omission” may be raised by “alleging that certain necessary *safety-related steps or analyses* have not been taken.” *Shaw AREVA MOX Servs.* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 206 (2007) (emphasis added). In contrast, Proposed Contention 1 claims that certain “*procedural steps*” have not been taken. Appeal at 10.

³⁴ Appeal at 12-13.

³⁵ See Petition at 12-13. The Petition also claimed certain safety-related information was omitted from the COLA. See *id.* at 14-15.

³⁶ See LBP-09-2, slip op. at 10.

³⁷ 10 C.F.R. § 2.309(f)(1)(vi).

that list in its reply.”³⁸ Petitioners continue to *ignore* the existence of this list on appeal — because it disputes the very basis of their contention. Thus, Petitioners have identified no error of law or abuse of discretion regarding the Board’s conclusion that Proposed Contention 1 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

The Board also correctly concluded that, to the extent that Proposed Contention 1 challenges the COLA because it references a pending design certification application, it raises matters outside the scope of this proceeding.³⁹ The NRC’s design certification process is set forth in Subpart C of 10 C.F.R. Part 52, and expressly authorizes a COL applicant to reference a standard design certification or an application for a design certification.⁴⁰ Consistent with that regulation, SCE&G’s COLA references the AP1000 design certification rule and associated amendment application.⁴¹ Thus, despite Petitioners’ unsupported assertions to the contrary, the COLA is not “deficient as a matter of law” because NRC regulations specifically allow SCE&G to reference the AP1000 design certification amendment application.

Furthermore, Petitioners’ concerns are addressed in the Commission’s New Reactor Policy Statement, wherein the Commission explains that:

With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that “licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.”

³⁸ LBP-09-2, slip op. at 10.

³⁹ See LBP-09-2, slip op. at 8-9 (*citing* 10 C.F.R. § 52.55(c); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-08-15, slip op. at 3 (July 23, 2008)).

⁴⁰ See 10 C.F.R. §§ 52.55(c), 52.73(a).

⁴¹ SCE&G COL Application, Rev. 0, Pt. 1, Administrative and Financial Information at 1 (Introduction). SCE&G pointed out in its Answer that it planned to update its COLA in 2009 to incorporate Revision 17 of the AP1000 DCD. See SCE&G Answer at 23 n.129. On February 13, 2009, SCE&G revised its COLA ER to, among other things, incorporate information from Revision 17 to the AP1000 DCD. See Letter from R. Clary, SCE&G, to NRC (Feb. 13, 2009), *available at* ADAMS Accession No. ML090510267. Later this year, SCE&G plans to update its COLA FSAR to do the same.

In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that *a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding.* Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, *if it is otherwise admissible.* Upon adoption of a final design certification rule, such a contention should be denied.⁴²

As Petitioners effectively concede, Proposed Contention 1 seeks to raise a "procedural" issue,⁴³ not a "design matter," as the Commission contemplated in the New Reactor Policy Statement.

The Commission upheld these principles in the *Shearon Harris* COL proceeding when it rejected a motion (to suspend a notice of hearing in that proceeding) that relied on essentially the same arguments advanced here by Petitioners relative to the pendency of a design certification rule.⁴⁴ The Commission emphasized that "[a] specific provision of Part 52 . . . allows applicants to reference a certified design that has been docketed but not approved, and Petitioners may not challenge Commission regulations in licensing proceedings."⁴⁵

Similarly, in the *Lee* COL proceeding, the Board applied these principles in dismissing a proposed contention that is materially indistinguishable from the Petitioners' proposed

⁴² Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (Final Policy Statement).(internal citations omitted) (emphasis added) (*quoting Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999), *Potomac Elec. Generating Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)). ("New Reactor Policy Statement"). In responding to public comments on a draft of the Policy Statement, the Commission explicitly stated that the discussion of design certification applications also encompasses an application for an amendment to a design certification. *Id.* at 20,966.

⁴³ Appeal at 10, 11.

⁴⁴ See *Shearon Harris*, CLI-08-15, slip op. at 3-4.

⁴⁵ *Id.* at 3 (citations omitted).

contention in this proceeding.⁴⁶ There, the Licensing Board ruled that “[b]ecause [the petitioner] challenges the Applicant’s reliance on a pending design certification fundamentally on *procedural grounds*, [the contention] constitutes an impermissible challenge to NRC regulations that allow the procedure [the Applicant] has chosen.”⁴⁷ So too, here, where Petitioners assert that SCE&G’s COLA is deficient because the final “procedural steps” in the AP1000 design certification amendment process have yet to take place.

Despite the Board’s proper application of these principles, Petitioners continue to erroneously assert that Proposed Contention 1 is virtually identical to a contention of omission admitted in the *Shearon Harris* COL proceeding.⁴⁸ The Board, however, appropriately distinguished the *Shearon Harris* decision. In particular, the Board explained that:

In the *Shearon Harris* proceeding, petitioners . . . in submitting its contentions asserted . . . specific omissions from the COLA itself. In contrast to Petitioner’s contention here, (a) the petitioners in *Shearon Harris* listed and asserted specific omissions from the application itself, whereas here Petitioner did not do so; and (b) in the *Shearon Harris* proceeding, neither Staff nor applicant took exception to the asserted omissions, nor attempted to indicate where the relevant information was presented. We face, in this proceeding, neither any specifically asserted and supported omission or error nor any absence of clarity regarding where the relevant matters are addressed in the COLA.⁴⁹

As discussed above, SCE&G demonstrated in Attachment 2 to its Answer that the “asserted omissions” are, indeed, included in the DCD and COLA. Furthermore, as the Board pointed out, Petitioners made no attempt to dispute the information that SCE&G provided in Attachment 2.⁵⁰

⁴⁶ *Duke Energy Carolinas* (Combined License Application for William States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, slip op. at 10-12 (Sept. 22, 2008).

⁴⁷ *Id.* at 11-12 (emphasis added).

⁴⁸ Appeal at 11-12.

⁴⁹ LBP-09-2, slip op. at 11-12.

⁵⁰ *Id.* at 8 n.36.

Petitioners have continually ignored the information in Attachment 2, and the fact that it fully demonstrates the fallacy of their “contention of omission.” Thus, the admitted contention in *Shearon Harris* is readily distinguishable from Proposed Contention 1.

Finally, Petitioners have not challenged the Board’s conclusion that Proposed Contention 1 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v). Specifically, the Board found that Petitioners failed “to provide a scintilla of factual or expert support for, let alone any references to specific sources or documents upon which it intends to rely to indicate any such asserted error.”⁵¹ The absence of such support, and Petitioners’ failure to address this reason for rejection of the proposed contention, underscores its inadmissibility.⁵²

Thus, Petitioners point to no error of law or abuse of discretion in the Board’s rejection of Proposed Contention 1. Accordingly, that aspect of the Board’s decision should be affirmed.

B. Proposed Contention 2 (Aircraft Crashes)

In Proposed Contention 2, Petitioners claimed that SCE&G failed to address the environmental impacts of aircraft crashes and the hypothetical resulting severe accident consequences.⁵³ In their original Petition, Petitioners sought to raise environmental issues under the National Environmental Policy Act of 1969, as amended (“NEPA”), as well as safety issues under the Atomic Energy Act of 1954, as amended (“AEA”), and the Commission’s implementing regulations.⁵⁴

⁵¹ *Id.* at 10.

⁵² *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999) (“A failure to comply with any of these requirements is grounds for dismissing the contention.”).

⁵³ Petition at 17.

⁵⁴ *Id.* at 17-18.

The Board found Proposed Contention 2 unsupported by either NEPA or NRC regulations and, thus, inadmissible.⁵⁵ Turning first to NEPA, the Board properly concluded that Proposed Contention 2 is inadmissible because consideration of aircraft attacks, under that statute, is outside the scope of this proceeding.⁵⁶ The Commission consistently has held that the NRC does not need to consider, as part of its environmental review, terrorist attacks on nuclear power plants.⁵⁷ Relying on the reasoning in its *Oyster Creek* decision, the Commission rejected a NEPA-terrorism contention in the *Grand Gulf* Part 52 licensing proceeding, stating:

“The ‘environmental’ effect caused by third-party miscreants ‘is . . . simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.’”
The claimed impact is too attenuated to find the proposed federal action to be the “proximate cause” of that impact.⁵⁸

The Board appropriately relied on this precedent in rejecting Proposed Contention 2. Again failing to acknowledge this controlling Commission precedent, Petitioners mistakenly assert that the Ninth Circuit’s decision in *Mothers for Peace* requires that the NRC investigate aviation threats,⁵⁹ a proposition the Commission expressly rejected in *Oyster Creek*.⁶⁰ Therein, the Commission explained that, while it is required to comply with the Ninth Circuit’s remand in the *Diablo Canyon* proceeding, it “is not obliged to adhere, in all of its proceedings, to the first

⁵⁵ LBP-09-2, slip op. at 16.

⁵⁶ *Id.* at 16-17 (citing *Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 122 (2007); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141-42 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-34 (2007)). The Board also found that the examination of severe accident mitigation alternatives (“SAMAs”) and severe accident mitigation design alternatives (“SAMDAs”) relating to aircraft attacks is outside the scope of this proceeding because such analyses arise under the NRC’s NEPA obligations. *Id.* at 17.

⁵⁷ *See, e.g., AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007); *Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144 (2007); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139 (2007).

⁵⁸ *Grand Gulf*, CLI-07-10, 65 NRC at 146-47 (quoting *Oyster Creek*, CLI-07-8, 65 NRC at 129).

⁵⁹ Appeal at 15.

⁶⁰ *See Oyster Creek*, CLI-07-8, 65 NRC at 128-29.

court of appeals decision to address a controversial question.”⁶¹ Petitioners ignore the *Oyster Creek* ruling. Accordingly, the Petitioners identify no error of law or abuse of discretion in the Board’s decision rejecting the NEPA-related aircraft crash challenges.

Turning next to the AEA, the Board also correctly found that Proposed Contention 2 is inadmissible as a safety-based contention under this statutory authority. NRC regulations do not require that SCE&G protect against an intentional aircraft crash. Rather, the regulations in 10 C.F.R. Part 73 require that a facility’s onsite physical protection system be designed to protect against the design basis threat (“DBT”), as defined in 10 C.F.R. § 73.1(a).⁶² In accordance with this requirement, SCE&G submitted its physical security plan as part of its COLA.⁶³

On appeal, Petitioners claim that an aircraft attack “is likely enough to qualify as a design-basis threat (“DBT”).”⁶⁴ However, in the 2007 amendment to the DBT rule, the Commission specifically considered whether to include an aircraft attack within the DBT rule and declined to do so.⁶⁵ Thus, there is no requirement that SCE&G’s proposed reactors defend against an airborne attack.⁶⁶ Accordingly, Petitioners unfounded assertion that an aircraft attack should be part of the DBT, at best, constitutes an impermissible challenge to the NRC’s regulations, but in any event fails to identify an error of law or abuse of discretion in the Board’s decision.

⁶¹ *Id.*

⁶² 10 C.F.R. § 73.55(a). Following the issuance of the recently-approved revision to NRC’s security regulations, this requirement will be found at 10 C.F.R. § 73.55(b)(2). *See* SECY-08-0099, Final Rulemaking—Power Reactor Security Requirements (RIN 3150-AG63), Encl. 1, at 39-40, 164 (July 9, 2008) (“SECY-08-0099 Enclosure 1”).

⁶³ VCSNS COLA, Rev. 0, Part 8 (non-public).

⁶⁴ Appeal at 14.

⁶⁵ *See* Design Basis Threat, 72 Fed. Reg. 12,705, 12,710-11, 12,725 (Mar. 19, 2007) (Final Rule).

⁶⁶ Furthermore, 10 C.F.R. § 52.10 specifies that a COL applicant is not “required to provide for design features or other measures for the specific purpose of protection against the effects of . . . [a]ttacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person.”

Nor is there a requirement that the AP1000 reactors be designed to withstand the impact from an accidental aircraft crash. The AP1000 DCD requires that a COL applicant referencing the design provide an analysis of aircraft hazards and requires no design changes if the probability of such an accident leading to severe consequences is less than one-in-a-million (1×10^{-6}).⁶⁷ SCE&G analyzed aircraft hazards in Section 2.2.2.7.6 of the FSAR and conservatively showed that the total probability of an aircraft accident is less than 3.64×10^{-8} per year. Contrary to the Section 2.309(f)(1)(vi) criterion, Petitioners do not dispute that evaluation.

Furthermore, there currently is no requirement that a new reactor be designed to protect against a beyond-design-basis aircraft impact. In support of Proposed Contention 2, Petitioners referred to a *draft* final NRC rule that would require that COL applicants perform an assessment of the impact of a large, commercial aircraft unless the COLA references a design certification that complies with the assessment requirement.⁶⁸ The Commission's release and the publication of the final rule were still pending when the Board issued its decision (and remain so as of this date).⁶⁹ Commission precedent clearly establishes that a contention that is the subject of an ongoing rulemaking is outside the scope of an adjudicatory proceeding.⁷⁰ Therefore, the Board properly found that subjects related to this ongoing rulemaking were beyond the scope of this proceeding.⁷¹ The Petitioners again fail to identify any error of law or abuse of discretion in the Board's decision rejecting the safety-related aircraft crash challenges.

⁶⁷ AP1000 DCD, Rev. 16, Tier 2, § 2.2, at 2-2 (Mar. 5, 2006).

⁶⁸ See Petition at 22-23.

⁶⁹ See Staff Requirements Memorandum M090217, Item I, at 1 (Feb. 17, 2009) (SECY-08-0152 – Final Rule – Consideration of Aircraft Impacts for New Nuclear Power Reactors (RIN 3150-AI19)) (“SRM M090217”).

⁷⁰ See *Oconee*, CLI-99-11, 49 NRC at 345; *Douglas Point*, ALAB-218, 8 AEC at 85.

⁷¹ See LBP-09-2, slip op. at 17 n.71. Petitioners note that a requirement originally contemplated as part of the aircraft impact rulemaking and located in 10 C.F.R. § 50.54(hh) was instead considered as part of a separate power reactor security rulemaking. See Appeal at 17. Although Petitioners appear to reference Section 50.54(hh) merely as background for their aircraft impact rule-related claims, this provision provides no

Most importantly, Petitioners' assertions regarding the pending aircraft impact rule fail to acknowledge that, Westinghouse already voluntarily performed an aircraft impact assessment for the AP1000, and submitted a summary of the assessment to the NRC.⁷² Westinghouse found that an "aircraft impact would not inhibit AP1000's core cooling capability, containment integrity, spent fuel pool integrity, or adequate spent fuel cooling based on best estimate calculations."⁷³ In fact, the Commission, in the Statement of Considerations for the draft final rule, explains that COL applicants (such as SCE&G) that reference the AP1000 would not be required to perform an aircraft assessment, if Westinghouse's submission is approved as part of the pending AP1000 design certification amendment.⁷⁴ In this respect, the Statement of Considerations further explains:

grounds for questioning the Board's denial of Proposed Contention 2. As a threshold matter, Section 50.54(hh) addresses *operational* requirements related to potential aircraft threats and *programmatic* mitigative strategies for addressing the loss of large areas of a plant due to explosions or fires from a beyond-design-basis event. See SECY-08-0099 Enclosure 1, at 112-13. In contrast, Proposed Contention 2 challenges the proposed reactor *design*. While Petitioners mention "mitigation" of aircraft accidents, this discussion is in the context of incorporating design features that would mitigate an aircraft impact. See, e.g., Petition at 23. Moreover, although the Commission approved Section 50.54(hh) as part of the power reactor security rulemaking, publication of the final rule was still pending when the Board issued its decision. See SRM M090217, Item I, at 1. Therefore, Section 50.54(hh) was the subject of a pending rulemaking and thus, beyond the scope of this proceeding. Finally, after the power reactor security rule is published and becomes effective, SCE&G must and will update its COLA to comply with Section 50.54(hh)(2) (which will be made applicable to COL applicants through a new paragraph (d) in 10 C.F.R. § 52.80). To date, the final rule has not been published. In any event, Petitioners provide no basis, no facts, and no expert opinion suggesting that SCE&G will not comply with this requirement. Even if they had attempted to make that showing, the Commission has long declined to assume that "licensees will refuse to meet their obligations under their licenses or our regulations." *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003) (citations omitted).

⁷² See SCE&G Answer at 42 (citing Letter from R. Sisk, Westinghouse, to NRC, "AP1000 Standard COL Technical Report Submittal of APP-GW-GLR-126, Revision 0 (TR 126) (Apr. 3, 2008), available at ADAMS Accession No. ML080980257; Westinghouse, Technical Report Number 126, APP-GW-GLR-126-NS, Nuclear Island Response to Aircraft Impact (Apr. 3, 2008) (public version), available at ADAMS Accession No. ML080980258).

⁷³ AP1000 DCD, Rev. 17, Tier 2, App. 19F.3, Results/Conclusions at 19F-1 (Oct 22, 2008).

⁷⁴ See SECY-08-0152, Final Rule—Consideration of Aircraft Impacts for New Nuclear Power Reactors (RIN 3150-A119), Encl. 1, at 97 (Oct. 15, 2008) ("For one of these certified designs, the AP1000, the original applicant has voluntarily submitted to the NRC an amendment that it believes will comply with the requirements of the aircraft impact rule. If the NRC approves the amendment as meeting the aircraft impact rule, then any combined license applicants referencing the recertified design will not be required to perform an aircraft impact assessment.").

[T]he adequacy of the impact assessment may not be the subject of a contention submitted as part of a petition to intervene under 10 CFR 2.309 [Rather, a] person who seeks NRC rulemaking action with respect to a proposed standard design certification on the basis that the requirements of the rule with respect to the identification and description of design features and functional capabilities has not been met could submit comments in the notice and comment phase of that rulemaking.⁷⁵

Accordingly, once the final aircraft impact rule is published and goes into effect, the proper venue for Petitioners to raise any concerns regarding the aircraft assessment is by participating in the AP1000 design certification amendment rulemaking.

Thus, Petitioners again point to no error of law or abuse of discretion in the Board's ruling on Proposed Contention 2. Accordingly, that aspect of the Board's decision should be affirmed.

C. Proposed Contention 3 (Need for Power, Cost of Action, and Alternatives)

In Proposed Contention 3, Petitioners presented a broad amalgam of NEPA-based claims that alleged purported deficiencies in SCE&G's Environmental Report ("ER"). In particular, they asserted that "SCE&G has overestimated the need for power to be provided by the proposed facility; has underestimated the cost of the proposed Summer reactors; and has failed to value alternatives including energy efficiency and renewable sources of power."⁷⁶ As discussed below, the Board properly found that Proposed Contention 3 falls far short of satisfying the Commission's contention admissibility requirements. Accordingly, Petitioners are unable to point to an error of law or abuse of discretion relating to the Board's denial of this contention.

⁷⁵ *Id.* at 29-30.

⁷⁶ Petition at 2.

1. Need for Power (Basis A)

Basis A of the proposed contention alleged that “the Applicant completely dismisses the current economic crisis and recent reductions in sales, and has conducted no sensitivities [sic] of its load forecast to try to capture the possible effects of a recession, including the possibility of a long and deep economic downturn.”⁷⁷ Thus, Petitioners claimed that SCE&G’s “load forecast is out of date and should not be relied upon by any utility or regulator to determine likely future needs for power in the SCE&G service area.”⁷⁸ On appeal, Petitioners now argue that the Board’s rejection of their need for power claim is inconsistent with the Commission’s denial of the Nuclear Energy Institute (“NEI”) petition to eliminate consideration of the need for power from the NRC’s NEPA review for new plants.⁷⁹

Despite Petitioners’ unfounded and misleading assertions to the contrary, the Board did not deny Proposed Contention 3 because it believed a need for power analysis was not

⁷⁷ *Id.* at 25.

⁷⁸ *Id.* at 31. We note that, on February 27, 2009, the South Carolina Public Service Commission (“PSC”) issued an Order approving SCE&G’s application to construct and operate the nuclear plants at issue here. Order No. 2009-104(A), slip op. at 119-126, *In re: Combined Application of S.C. Elec. & Gas Co. for a Certificate of Env’tl. Compatibility and Pub. Convenience and Necessity and for a Base Load Review Order for the Construction and Operation of a Nuclear Facility in Jenkinsville, S.C.*, No. 2008-196-E (PSC S.C. Mar. 2, 2009). FOE (represented, as here, by Mr. Guild and supported by testimony by Ms. Brockway), Ms. Corbett, Ms. Miner, Ms. Greenlaw, and Ms. Warshauer (as well as another unrelated petitioner in this proceeding, Mr. Joseph Wojcicki) all participated in that proceeding. *Id.* at 3-4. In approving the application, the PSC found that SCE&G “has in fact demonstrated the need for the Units and the need to proceed with their construction,” *id.* at 28; that this need forecast accounts for the current economic downturn, *id.* at 23-24; and that this need “is most reliably and efficiently met through the addition of new base load capacity to its system,” *id.* at 27. The PSC also found that SCE&G “properly concluded that wind, solar, landfill gas, and biomass do not constitute resources on which it can prudently and economically rely at this time.” *Id.* at 44. Although the PSC ordered that SCE&G investigate additional DSM programs, *see id.* at 126, it found that the “additional savings due to DSM programs are not a viable substitute for the base load capacity that SCE&G seeks to build.” *Id.* at 20. The PSC also found that SCE&G “reasonably estimated” the costs of nuclear generation; that there was no flaw in “analysis of the comparative economics of alternative generation resources,” *id.* at 50; and that “SCE&G’s selection of the AP 1000 units as Units 2 and 3 was prudent and reasonable,” *id.* at 65. The PSC’s Order is, however, subject to appeal in the State courts. (The PSC’s Order was reissued on March 2, 2009, to correct edits, which did not affect the PSC findings, not reflected in the February 27th document because of a server problem. *Id.* at 1 n.1.)

⁷⁹ Appeal at 20 (*citing* Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905 (Sept. 29, 2003) (“Denial of NEI Petition”).

required.⁸⁰ Rather the Board clearly rejected Petitioner’s need for power claim because SCE&G’s COLA *includes* a need for power evaluation and that evaluation *considers* different economic conditions, *including the effects of current economic conditions*.⁸¹ The Board also pointed out that Petitioners provided no supporting data or analysis to indicate that SCE&G’s load forecast is incorrectly calculated, or that the magnitude of the current recession could impact that forecast.⁸² Accordingly, the Board properly found that Proposed Contention 3 failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(i), (iv), and (vi).⁸³

Petitioners also claim that Proposed Contention 3 was “extensively supported” by the Brockway Declaration.⁸⁴ In fact, the Board correctly found that the Brockway Declaration itself failed to provide adequate factual or expert opinion support and failed to demonstrate the existence of genuine material dispute.⁸⁵ “Ms. Brockway did not quantify the impact on the needed power nor provide any alternative analysis to that provided in the COLA.”⁸⁶ In spite of their participation in the proceeding before the PSC,⁸⁷ Petitioners provided no meaningful

⁸⁰ If anything, the Board strictly adhered to and applied the principles identified by the Commission’s denial of the NEI petition for rulemaking. As the Board recognized, *see* LBP-09-2, slip op. at 21 n.81, and the Commission has emphasized in discussing the requirements for the need for power evaluation, “the Commission is not looking for burdensome attempts by the applicant to precisely identify future market conditions and energy demand.” Denial of NEI Petition, 68 Fed. Reg. at 55,910 (*citing La. Energy Servs., L.P. (Claiborne Enrichment Ctr.)*, CLI-98-3, 47 NRC 77, 88, 94 (1998)).

⁸¹ LBP-09-2, slip op. at 21. *See also* SCE&G Answer at 54 (*citing* ER § 8.1.1.1, at 8.1-2).

⁸² LBP-09-2, slip op. at 21.

⁸³ *Id.*

⁸⁴ Appeal at 20.

⁸⁵ *See* LBP-09-2, slip op. at 21 n.80

⁸⁶ *Id.*

⁸⁷ Indeed, the Brockway Declaration proffered in this proceeding is largely the same as the testimony she offered in the PSC proceeding. It is clear, that overall, Petitioners are seeking simply to rehash issues already rejected in a more appropriate forum. As observed in the *Susquehanna* power uprate proceeding, as a matter of policy, Licensing Boards should reject contentions that attempt to litigate an issue that is “primarily the responsibility of other federal or state/local regulatory agencies.” *PPL Susquehanna LLC (Susquehanna Steam Elec. Station, Units 1 & 2)*, LBP-07-10, 66 NRC 1, 27 (2007).

support—factual or otherwise—for their assertion that SCE&G’s load forecast is “unreliable.”⁸⁸

With respect to SCE&G’s and Santee Cooper’s capacity and demand forecasts in ER Figures 8.1-3 and 8.2-2, Petitioners state only that they “are basic straight-line extensions of the experience of recent years.”⁸⁹ No further insights are offered by Petitioners or Ms. Brockway.

By merely alleging undefined and general “uncertainties” due to current, wide-ranging economic conditions, Petitioners yet again ignore a well-established principle governing review of need-for-power forecasts in NRC adjudicatory proceedings. In the leading case, *Niagara Mohawk Power Corp.*, the Appeal Board held that “inherent in any forecast of future electric power demands is a substantial margin of uncertainty,” and therefore the applicant’s projection of future need should be accepted if it is “reasonable.”⁹⁰ This standard has been endorsed by the Commission itself in *Carolina Power and Light Co.*, where it stated:

The Nine Mile Point rule recognizes that every prediction has associated uncertainty and that long-range forecasts of this type are especially uncertain in that they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, *the general state of the economy*, etc. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, extrapolations from usage in residential, commercial, and industrial sectors, etc.⁹¹

Petitioners here provided no demonstration to suggest that the load forecasts are so unreasonable as to preclude proper consideration of environmental impacts by SCE&G and,

⁸⁸ Petition at 31.

⁸⁹ *Id.* at 30.

⁹⁰ *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365-67 (1975).

⁹¹ *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), CLI-79-5, 9 NRC 607, 609-10 (1979) (emphasis added).

ultimately, by the NRC.⁹² Although Petitioners have sought to bolster their claim with the opinion of an expert, that opinion is conspicuously short on analysis and long on speculation. The Commission has made clear that “an expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.”⁹³ The Brockway Declaration is flawed for this very reason, as it relies entirely on conclusory statements that the COLA is “unresponsive” and “unreliable.”⁹⁴ Accordingly, Petitioners point to no error of law or abuse of discretion in this aspect of the Board’s decision rejecting Basis A.

2. Proposed Action Alternatives (Bases B, C, and D)

Petitioners provided the following three bases to support their claims relating to SCE&G’s energy generation alternatives analysis:

- Basis B of the proposed contention alleged that “the Applicant almost completely ignores demand-side management [“DSM”], undervaluing opportunities for cost-effective energy efficiency and demand response or load management.”⁹⁵
- Basis C asserted that “the Applicant ignores the potential contribution of renewables to an overall sustainable and economic portfolio, and does not take into account significant improvement in unit costs and operations of renewables in recent years and as projected to continue.”⁹⁶

⁹² In the Commission’s words: “Quibbling over the details of an economic analysis in this situation is . . . ‘standing NEPA on its head’ by asking that the license be rejected not due to environmental costs, but because the economic benefits [allegedly] are not as great as estimated in the [ER].” *Private Fuel Storage* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 145 (2004).

⁹³ *USEC*, CLI-06-10, 63 NRC at 472 (*quoting Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff’d*, CLI-98-13, 48 NRC 26 (1998).

⁹⁴ Appeal at 22 (*quoting Brockway Declaration* at ¶¶ 10, 17).

⁹⁵ Petition at 25, 34, 46.

⁹⁶ *Id.* at 25-26, 39, 46.

- Basis D raised alleged that “the Applicant fails to properly evaluate the risk of choosing a single technology and two extremely large construction projects in lieu of a more modular approach.”⁹⁷

Petitioners argue on appeal that the Board improperly dismissed Petitioners’ three energy generation alternative claims. In particular, they claim that the Board improperly deferred to SCE&G’s stated purpose (*i.e.*, meeting future generating needs for baseload power) when it rejected their DSM, renewables, and “modular” approach claims.⁹⁸ Petitioners cite the U.S. Court of Appeals decision in *Environmental Law & Policy Center v. NRC* as support for this position, and argue that the “Board so narrowed the proposed action to be considered, by adopting the applicant’s stated purpose, as to eliminate the consideration of *any* alternatives.”⁹⁹

Petitioners’ selective and misleading quotation of case law once again ignores longstanding agency precedent: The Commission itself has stated unequivocally that, as a general matter, it may “accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.”¹⁰⁰ In this same vein, NRC “will ordinarily give substantial weight to a properly-supported statement of purpose and need by an applicant and/or sponsor of a project in determining the scope of alternatives to be considered by the NRC.”¹⁰¹

These principles are fully consistent with *Environmental Law & Policy Center*, wherein the Court of Appeals *affirmed* the Commission’s adoption of an applicant’s goal of generating baseload energy. The Court found this purpose “broad enough to permit consideration of a host of energy generating alternatives.”¹⁰² So too, here, as the Board recognized, SCE&G examined a

⁹⁷ *Id.* at 42.

⁹⁸ Appeal at 19-20, 23-27.

⁹⁹ *Id.* at 19-20 (emphasis added) (*citing Env'tl. Law & Policy Ctr. v. NRC*, 470 F.3d 676 (7th Cir. 2006)).

¹⁰⁰ *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (*citing Citizens Against Burlington v. Busey*, 938 F.2d 190, 197 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991)).

¹⁰¹ Denial of NEI Petition, 68 Fed. Reg. at 55,909.

¹⁰² *Env'tl. Law & Policy Ctr.*, 470 F.3d at 684.

host of energy generation alternatives, including DSM, renewables, and combinations of energy generation sources.¹⁰³ Thus, Petitioners' assertion that SCE&G's stated goal eliminates "the consideration of *any alternatives*"¹⁰⁴ is belied by the facts and borders on absurd.¹⁰⁵

Accordingly, the Petitioners point to no error of law or abuse of discretion in the Board's ruling that Bases B, C, and D are outside the scope of this proceeding and, thus, fail to satisfy 10 C.F.R. § 2.309(f)(1)(iii), and raise matters that are not material to the findings the NRC must make and, thus fail to satisfy 10 C.F.R. § 2.309(f)(1)(iv).¹⁰⁶

Furthermore, Petitioners' Appeal fails to call into question the Board's conclusion that none of their energy generation alternative claims explicitly controvert the analyses set forth in SCE&G's COLA, contrary to 10 C.F.R. § 2.309(f)(1)(vi),¹⁰⁷ or that Petitioners failed to provide any support for the assertion that these are reasonable means to generate baseload power, contrary to 10 C.F.R. § 2.309(f)(1)(iv).¹⁰⁸ With respect to DSM, the Board appropriately recognized that "the various DSM-related reports and initiatives discussed by Petitioners—which generally cite single-digit percentage gains in energy savings or efficiency—are not a substitute for the over 2000 megawatts-electric of baseload generating capacity that SCE&G seeks to install at VCSNS."¹⁰⁹ As the Board further recognized, "an applicant is not required to examine

¹⁰³ See LBP-09-2, slip op. at 22, 24, 26.

¹⁰⁴ Appeal at 19-20 (emphasis added) (*citing* LBP-09-2, slip op. at 24).

¹⁰⁵ Furthermore, the Board did not "blindly adopt[]" SCE&G's goal of generating baseload power. See *Env'tl. Law & Policy Ctr.*, 470 F.3d at 683. Rather the Board appropriately placed the burden on Petitioners to come forward with support showing no need for baseload power exists, and as discussed above, the Board properly found that the Petitioners failed to meet this burden. See LBP-09-2, slip op. at 21-22.

¹⁰⁶ LBP-09-2, slip op. at 23-26.

¹⁰⁷ *Id.* at 24.

¹⁰⁸ *Id.* at 24.

¹⁰⁹ *Id.* at 22-23 (*quoting* SCE&G Answer at 62).

all possible alternatives, but only those that can reasonably accomplish its elected purpose.”¹¹⁰

Accordingly, the Board properly held that Petitioners failed to “provide any support for the proposition that the alternatives it suggests are reasonable means by which to generate base-load power.”¹¹¹ The Petitioners offer nothing in their Appeal to suggest any error in the Board’s Order.

Next, with respect to renewables, the Board found that SCE&G “considered and examined precisely those renewable sources of power that Petitioner extols here (wind, solar, and biomass) and determined that those sources, individually or in combination, cannot meet the identified purpose of the proposed action, which is to develop approximately 2000 megawatts of base-load electrical generation.”¹¹² Importantly, the Board also concluded that “no specific error is pointed to in Applicant’s analysis, nor is Applicant’s conclusion that Petitioner’s proposed alternatives cannot generate base-load power challenged by Petitioner.”¹¹³ Again, the Petitioners offer nothing in their Appeal to suggest any error in the Board’s Order in regard to this basis.

Finally, with respect to modular or combination approaches, the Board found that SCE&G considered “combinations of energy sources as alternatives to the construction and operation of proposed VCSNS Units 2 and 3,” and none of those evaluations are controverted by Petitioner.”¹¹⁴ Furthermore, the Board emphasized that “[t]o the extent that Petitioner asserts in this contention that Applicant had an obligation to examine other (modular) alternatives, the obligation falls squarely upon Petitioner to specify such alternatives and indicate why they are

¹¹⁰ *Id.* at 25 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978)).

¹¹¹ *Id.* at 24.

¹¹² *Id.* at 24-25.

¹¹³ *Id.* at 25.

¹¹⁴ LBP-09-2, slip op. at 26 (quoting SCE&G Answer at 70).

appropriate, and Petitioner has identified no such alternative with any particularity.”¹¹⁵ And yet again, the Petitioners’ Appeal provides nothing to suggest any error in the Board’s Order in this regard.

On appeal, Petitioners are blatantly misleading in suggesting that SCE&G “dismissed” or “ignored” these energy generation alternatives.¹¹⁶ Petitioners simply failed to meet their initial pleading burden to adduce adequate support for their proposed contention. Accordingly, Petitioners point to no error of law or abuse of discretion regarding the Board’s rejection of Bases B, C, and D of Proposed Contention 3.

3. Proposed Action Consequences (Bases E, F, and G)

Petitioners also provided the following three bases to support their claims relating to the hypothetical economic and financial consequences of constructing the proposed VCSNS units:

- Basis E stated that “the Applicant underestimates the impact of its proposed construction and operation on vulnerable customers via rate increases.”¹¹⁷
- Basis F alleged that “the Applicant’s cost estimate for construction and operation” of the proposed VCSNS units “fails to take into account recent rapid increases in the costs of inputs for construction.”¹¹⁸
- Basis G alleged that SCE&G’s “cost estimate for construction and operation is based on an unrealistic schedule,” and improperly “assumes a settled and approved design for its proposed AP1000.”¹¹⁹

On appeal, Petitioners simply rehash the unsupported arguments raised and rejected by the Board. Petitioners claim that SCE&G underestimates the cost for the proposed VCSNS

¹¹⁵ *Id.* (citing *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 158 (2005)).

¹¹⁶ *See* Appeal at 12, 29.

¹¹⁷ Petition at 26, 42.

¹¹⁸ *Id.* at 26, 42.

¹¹⁹ *Id.* at 42, 47.

units. The true cost estimate, they suggest, is relevant because their vaguely described “modular” approach “may emerge as an environmentally preferable alternative.”¹²⁰

The Board correctly rejected Petitioners’ argument regarding the cost estimates for the proposed VCSNS units. As the Board succinctly explained:

The accuracy of project cost estimates only becomes relevant if an environmentally preferable alternative has been identified. In the present situation, since neither the Applicant’s ER nor Petitioner’s petition identifies an alternative that is preferable from the perspective of its environmental impacts, the cost of the proposed project (and therefore the accuracy of the estimates thereof) is irrelevant to the decision the NRC must make.¹²¹

In reaching this conclusion, the Board appropriately applied longstanding NRC precedent. In *Midland*, the Appeal Board held:

[NEPA] requires us to consider whether there are *environmentally* preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. *But if there are no preferable environmental alternatives, such cost-benefit balancing does not take place.*¹²²

Thus, “NEPA requires [the NRC] to look for environmentally preferable alternatives, not cheaper ones.”¹²³ Accordingly, whether the cost of a proposed project is reasonable is left “to the business judgment of the utility companies and to the wisdom of the State regulatory agencies responsible for scrutinizing the purely economic aspects of proposals to build new generating facilities.”¹²⁴

¹²⁰ Appeal at 30.

¹²¹ LBP-09-2, slip op. at 27-28. *See also id.* at 25 (citing *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 163 (1978)).

¹²² *Midland*, ALAB-458, 7 NRC at 162 (emphasis added).

¹²³ *Id.* at 168.

¹²⁴ *Id.* at 162-63.

Accepting Petitioners' argument here not only would require overruling the substantive standard set in *Midland*, but also would undermine the Commission's contention admissibility requirements. Specifically, rather than *demonstrating* the existence of a reasonable energy alternative that is environmentally preferable, Petitioners *speculate* that their still-undefined "modular" approach "may emerge as an environmentally preferable alternative."¹²⁵ But "neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention."¹²⁶ Without an environmentally preferable alternative identified in the COLA or appropriately specified and supported by the Petitioners, a precise cost estimate is simply not relevant. Petitioners' approach, in essence, puts the cart before the horse. Accordingly, the Board properly held that the project's cost estimates are outside the scope of this proceeding and not material to the findings that the NRC must make. The Petitioners establish no error in that judgment.

Petitioners further claim on appeal that these purportedly higher construction costs will result in higher electric rates to consumers that would constitute "rate shock" and produce hardship for many individuals.¹²⁷ The Board, however, properly explained that "the issue of electric rates is . . . 'germane to protection of the 'public interest' as opposed to public health and safety or the environment'" and, as a consequence, "[t]he issue of future rates for Applicant's customers is outside the purview of the NRC."¹²⁸ The Board properly followed prior holdings of the Commission.¹²⁹

¹²⁵ Appeal at 29-30 (emphasis added).

¹²⁶ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 235 (2007) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)).

¹²⁷ Appeal at 29.

¹²⁸ LBP-09-2, slip op. at 26 (quoting SCE&G Answer at 71).

¹²⁹ *Id.* at 26-27 (citing *La. Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 88 (1998)).

Petitioners attempt to dispute this conclusion by suggesting that the “inability to pay for adequate electricity would constitute an adverse impact on the human environment.”¹³⁰ A conclusory statement that higher rates impact the human environment is insufficient. “It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from *environmental damage*.”¹³¹ Petitioners’ conclusory statement regarding impact to ratepayers points to no environmental nexus.

Furthermore, the Commission has specifically held that matters affecting the “public interest” (*e.g.*, potential effects on electricity rates) are properly dealt with by other agencies:

This issue is too broad and vague to be suitable for adjudication. Moreover, 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 Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility.¹³²

This holding, though made in the license transfer context, is directly on point in this proceeding. The Board agreed. In fact, the Commission and its adjudicatory boards have held on numerous occasions that general economic concerns—including concerns about the impact of a facility on utility rates and the local economy are not proper subjects for litigation in NRC proceedings.¹³³ Accordingly, the Board properly rejected Petitioners’ rate-related claims for failing to satisfy 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

* * * *

¹³⁰ Appeal at 28.

¹³¹ *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 10 (1998) (*citing Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992) (emphasis added)).

¹³² *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 342 (2002) (*citing Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 & 2) CLI-01-19, 54 NRC 109, 149 (2001)).

¹³³ *See, e.g., Babcock and Wilcox* (Apollo, Pa. Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n.64 (1993); *Pub. Serv. Co. of N.H.* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190 (1984).

As discussed above, Petitioners point to no error of law or abuse of discretion in the Board's ruling on Proposed Contention 3. Accordingly, that aspect of the Board's decision should be affirmed.

VI. CONCLUSION

For the foregoing reasons, the Commission should reject the Appeal and affirm the Board's Order.

Respectfully submitted,

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Dated in Washington, D.C.
this 9th day of March 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

)	
In the Matter of)	
)	Docket Nos. 52-027 and 52-028
SOUTH CAROLINA ELECTRIC & GAS)	
COMPANY AND SOUTH CAROLINA)	March 9, 2009
PUBLIC SERVICE AUTHORITY (ALSO)	
REFERRED TO AS SANTEE COOPER))	
)	
(Virgil C. Summer Nuclear Station Units 2)	
and 3))	

CERTIFICATE OF SERVICE

I hereby certify that, on March 9, 2009, a copy of “South Carolina Electric & Gas Company’s Brief in Opposition to Sierra Club and Friends of the Earth Appeal from LBP-09-2” was served electronically with the Electronic Information Exchange on the following recipients:

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