

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

May 15, 2009

DB1/62904602

II. BACKGROUND

On April 6, 2009, the Sustainable Energy and Economic Development Coalition (“SEED”), Public Citizen, True Cost of Nukes, and Lon Burnam (jointly, “Petitioners”) filed their “Petition for Intervention and Request for Hearing” (“Petition”) in the above-captioned proceeding. In response, Luminant and the NRC Staff filed timely, separate answers to the Petition on May 1, 2009.² On May 8, 2009, Petitioners filed their Reply to NRC Staff’s Answer and their Reply to Luminant’s Answer. Except for their response to Contention 7, Petitioners’ Reply to Luminant’s Answer incorporates by reference Petitioners’ Reply to the NRC Staff. As discussed in Section IV below, Petitioners’ Reply to the NRC Staff (and, by reference, the Reply to Luminant’s Answer) contains extensive new arguments, references, and attachments not contained in their Petition.³

III. LEGAL STANDARDS

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers. A reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention.⁴ 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

² Luminant’s Answer Opposing Petition for Intervention and Request for Hearing (May 1, 2009); NRC Staff’s Answer to Petition for Intervention and Request for Hearing (May 1, 2009).

³ Luminant believes that the new arguments, references, and attachments do not provide an adequate basis for an admissible contention. Therefore, if the Board decides to consider the new arguments, references, and attachments contained in the Reply, Luminant requests an opportunity to file a response.

⁴ 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); *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) (refusing to consider references to various documents identified in a petitioner’s reply that were not included in the original petition).

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).⁵

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.”⁶ 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.”⁷

Accordingly, a petitioner must include all of its arguments and claims in its initial filing. Allowing a party to amend or supplement its pleadings in reply to the applicant’s or NRC Staff’s answers would run afoul of the Commission’s clear directives:

Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.⁸

⁵ *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

⁶ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (“LES”).

⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

⁸ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes and citation omitted).

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.⁹ "Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims."¹⁰ Thus, "[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."¹¹ Accordingly, "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."¹² Any arguments that improperly expand upon that should be stricken.¹³

These principles have recently been applied in the *Bellefonte* COL proceeding. In that proceeding, the petitioners submitted a reply that contained new arguments and factual allegations (including a new affidavit and reports) in an attempt to cure deficiencies in the proposed contentions in the petition to intervene. The licensing board granted the applicant's motion to strike that new information, ruling that reply pleadings cannot be used to provide new information to cure defects in proposed contentions.¹⁴

⁹ Under 10 C.F.R. § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner's reply. Luminant has no opportunity to respond to the new information provided by the Petitioners.

¹⁰ *Palisades*, CLI-06-17, 63 NRC at 732.

¹¹ *LES*, CLI-04-25, 60 NRC at 225.

¹² Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

¹³ 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").

¹⁴ *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC ___, slip op. at 37-38, 43, 48-49, 79 (Sept. 12, 2008).

IV. **BASES FOR MOTION TO STRIKE**

As detailed in the following table, Petitioners' Reply to the NRC Staff (and, by reference, the Reply to Luminant's Answer) contains numerous new arguments, references, and attachments.

Location of New Information in Reply to the NRC Staff	Description of New Information
<u>Contention 2</u> • The sentences that include citations to 10 C.F.R. § 52.79(a)(3) on pages 3 and 4. • The last paragraph of the discussion of this contention on pages 4 and 5, and the entire attachment entitled "Comments of the Institute for Energy and Environmental Research on the U.S. Nuclear Regulatory Commission's Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage."	These portions of the Reply provide new arguments and information that were not identified in the Petition. In particular, the Petition raised arguments regarding the Environmental Report ("ER"), but did not discuss the requirements of 10 C.F.R. § 52.79(a)(3), which is a Final Safety Analysis Report ("FSAR") requirement. Additionally, the Petition did not (but could have) included or referenced Dr. Makhijani's February 6, 2009 comments on the Commission's proposal to update the Waste Confidence Rule.
<u>Contention 3</u> • The paragraph on page 5 that begins "The Atomic Energy Act" and argues that terrorists attacks on dry cask storage should be considered pursuant to 10 C.F.R. § 50.54(hh).	This paragraph of the Reply provides new information and arguments that were not identified in the Petition. Contention 3 in the Petition raised arguments regarding the ER, but did not discuss the requirements of 10 C.F.R. § 50.54(hh).

Location of New Information in Reply to the NRC Staff	Description of New Information
<u>Contention 8</u> • The sentence that includes a citation to 10 C.F.R. § 52.79(a)(3) on page 10. • The sentence on page 10 beginning “According to the American Society of Civil Engineers,” through the end of the reference to the web page on page 10 of the Reply. • The first, second, and third full paragraphs on page 11, which discuss and contain references related to dam failures. • The sentence on page 12 that begins with “Nuclear plants in drought prone areas,” through the reference that precedes the sentence on page 12 beginning “Accordingly, assumptions about future availability of water.”	These portions of the Reply provide new arguments and information that were not identified in the Petition. Contention 8 in the Petition did not discuss or reference the requirements of 10 C.F.R. § 52.79(a)(3). Nor did the Petition reference the web pages cited in the Reply or discuss the information provided in the Reply regarding the American Society of Civil Engineers, coal slurry retention structures, uranium tailing dam failures, dam inspections in Texas, the impact of drought on nuclear plants, or long-term projected climate conditions.
<u>Contention 9</u> • The second sentence of the discussion of this contention beginning on page 13 and the entire attachment entitled “Response of Dr. Arjun Makhijani to the NRC Staff’s position on Contention 9 regarding the use of the LADTAP II model” (“Makhijani Response”). • The sentence on page 14 beginning “Dr. Makhijani references” and the entire attachment entitled “SECY-08-0197.”	These portions of the Reply provide new arguments and information related to the use of LADTAP II. In particular, the Petition did not provide the Makhijani Response. Furthermore, the Petition focused on doses from commercial fish and saltwater invertebrates, but the Makhijani Response referenced in the Reply focuses on doses from recreational fishing, the adequacy of NRC’s radiation protection regulations, and the potential revision of these regulations that is discussed in SECY-08-0197.

The Licensing Board should strike these new arguments, references, and attachments that Petitioners impermissibly raise for the first time in Petitioners’ Reply. These portions of the Petitioners’ Reply fail to “focus narrowly on the legal or factual arguments first presented in the original petition or raised in answers to it.”¹⁵ Instead, these portions of the Petitioners’ Reply impermissibly attempt to expand the scope of the contentions in the Petition and provide new bases and supporting material for the contentions, without addressing the criteria for late-filed or

¹⁵ *Palisades*, CLI-06-17, 63 NRC at 732.

amended contentions in 10 C.F.R. § 2.309(c) and (f)(2). Petitioners cannot now try to provide additional information to remedy the defects in their original contentions. Additionally, much of this information is not “narrowly focused on the legal or logical arguments presented in the applicant/license or NRC staff answer.”¹⁶ Instead, Petitioners provide new information in their Reply, to which Luminant and the NRC Staff are not allowed to respond. Accordingly, the new arguments, references, and attachments should be stricken.

V. CONCLUSION

For the foregoing reasons, the Board should strike the new arguments, references, and attachments impermissibly provided in Petitioners’ Reply to NRC Staff’s Answer (and, by reference, the Reply to Luminant’s Answer).

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

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this 15th day of May 2009

¹⁶ Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
LUMINANT GENERATION COMPANY LLC	)	Docket Nos. 52-034-COL
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	52-035-COL
	)	May 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2009 a copy of “Luminant’s Motion to Strike Portions of Petitioners’ Reply” was served by the Electronic Information Exchange on the following recipients:

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