

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
STP NUCLEAR OPERATING COMPANY)	Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))	52-013-COL
	June 4, 2009

**STP NUCLEAR OPERATING COMPANY'S
MOTION TO STRIKE PORTIONS OF PETITIONERS' REPLY**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a), STP Nuclear Operating Company (“STPNOC”), applicant in the above-captioned matter, hereby files this motion to strike the new arguments, references, and attachment contained in “Petitioners’ Reply to NRC Staff’s Answer to Petition for Intervention and Request for Hearing” (“Reply to Staff’s Answer”) and “Petitioners’ Reply to Applicant’s Answer to Petition for Intervention and Request for Hearing” (“Reply to STPNOC’s Answer”) (jointly, the “Reply”), both dated May 26, 2009.¹ As discussed below, the Reply impermissibly includes new arguments, references, and an attachment without satisfying the standards governing late-filed contentions set forth in 10 C.F.R. § 2.309(c) and (f)(2). Accordingly, this new information should be stricken.

II. BACKGROUND

On April 21, 2009, the Sustainable Energy and Economic Development Coalition, Susan Dancer, South Texas Association for Responsible Energy, Daniel Hickl, Public Citizen, and Bill

¹ As required by 10 C.F.R. § 2.323(b), counsel for STPNOC contacted Petitioners’ counsel, in an attempt to resolve the issues in this Motion. Petitioners did not agree to the relief requested in this Motion. Counsel for the NRC Staff agrees that the Reply inappropriately included new information.

Wagner (“Petitioners”) filed their “Petition for Intervention and Request for Hearing” (“Petition”) in the above-captioned proceeding. In response, STPNOC and the NRC Staff timely filed answers to the Petition on May 18, 2009.² On May 26, 2009, Petitioners filed their Reply to Staff’s Answer and their Reply to STPNOC’s Answer. Except for the reply to Contention 2, the Reply to STPNOC’s Answer incorporates by reference the Reply to Staff’s Answer. As discussed in Section IV below, Petitioners’ Reply to Staff’s Answer (and, by reference, the Reply to STPNOC’s Answer) contains extensive new arguments, references, and an attachment 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 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

² STP Nuclear Operating Company’s Answer Opposing Petition for Intervention and Request for Hearing (May 18, 2009); NRC Staff’s Answer to Petition for Intervention and Request for Hearing (May 18, 2009).

³ STPNOC believes that the new arguments, references, and attachment do not provide an adequate basis for an admissible contention. Therefore, if the Board decides to consider the new arguments, references, and attachment contained in the Reply, STPNOC 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).

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:

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 petitioner 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

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

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

⁶ *La. Energy Servs., L.P.* (National 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.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes and citation omitted).

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* combined license 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 *Bellefonte* 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

IV. BASES FOR MOTION TO STRIKE

As detailed in the following table, Petitioners’ Reply to Staff’s Answer (and, by reference, the Reply to STPNOC’s Answer) contains numerous new arguments, references, and an attachment.

⁹ Under 10 C.F.R. § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner’s reply. STPNOC 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).

Location of New Information in Reply to Staff's Answer	Description of New Information
<p><u>Contention 2</u></p> <ul style="list-style-type: none"> On page 7, strike the last sentence related to Contention 2, which references the fire protection requirements in 10 C.F.R. § 52.79(a)(6). 	<p>The Petition to did not discuss the fire protection requirements in 10 C.F.R. § 52.79(a)(6), and this sentence constitutes an impermissible expansion of the scope of Contention 2.</p>
<p><u>Contention 3</u></p> <ul style="list-style-type: none"> The sentences that include citations to 10 C.F.R. § 52.79(a)(3) on pages 8 and 9. 	<p>These portions of the Reply provide new arguments 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.</p>
<p><u>Contention 5</u></p> <ul style="list-style-type: none"> The paragraph on page 10 that begins “The Atomic Energy Act” and argues that terrorist attacks on dry cask storage should be considered pursuant to 10 C.F.R. § 50.54(hh). The sentence that includes citation to 10 C.F.R. § 52.79(a)(3) on pages 11 and 12. 	<p>These portions of the Reply provide new information and arguments that were not identified in the Petition. Contention 5 in the Petition raised arguments regarding the ER, but did not discuss the requirements of 10 C.F.R. § 50.54(hh), which is a regulation that pertains to safety and not the ER. Additionally, the Petition did not discuss the requirements of 10 C.F.R. § 52.79(a)(3), which is a FSAR requirement.</p>

Location of New Information in Reply to Staff's Answer	Description of New Information
<p><u>Contention 8</u></p> <ul style="list-style-type: none"> • The sentences that includes citations to 10 C.F.R. § 52.79(a)(3) on pages 12 and 15-16. • The sentence on page 13 beginning “According to the American Society of Civil Engineers,” through the reference in that paragraph to www.npr.org. • The last two paragraphs on page 13 and the first paragraph on page 14, which discuss and contain references related to dam failures. • The sentence in the third paragraph on page 14 that begins with “Nuclear plants in drought prone areas,” through the reference in fourth paragraph on page 14 that precedes the sentence beginning “Accordingly, assumptions about future availability of water.” • The sentence in the first paragraph on page 16 beginning “The contention is likewise.” 	<p>These portions of the Reply provide new arguments and information that were not identified in the Petition. Contention 8 in the Petition pertains to the contents of the ER and did not discuss or reference the requirements of 10 C.F.R. § 52.79(a)(3), which pertains to the contents of the FSAR. Nor did the Petition reference the webpages 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.</p>
<p><u>Contention 17</u></p> <ul style="list-style-type: none"> • The sentence on page 16 beginning “Dr. Makhijani’s reply.” • The entire attachment entitled “Response of Dr. Arjun Makhijani to the NRC Staff’s position on Contention 17 regarding the use of the LADTAP II model” (“Makhijani Response”). • The sentence on page 16 beginning “Dr. Makhijani references.” • The sentence on page 17 beginning “Dr. Makhijani’s reply.” • The sentence on page 17 beginning “Dr. Makhijani references.” 	<p>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 the adequacy of NRC’s radiation protection regulations and the potential revision of these regulations that is discussed in SECY-08-0197.</p>

The Licensing Board should strike these new arguments, references, and the attachment that Petitioners impermissibly raise for the first time in their 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 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 STPNOC and the NRC Staff are not allowed to respond. Accordingly, the new arguments, references, and attachment should be stricken.

V. CONCLUSION

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

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

Steven P. Frantz

John E. Matthews

Stephen J. Burdick

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone: 202-739-3000

Fax: 202-739-3001

E-mail: sfrantz@morganlewis.com

Counsel for STP Nuclear Operating Company

Dated in Washington, D.C.
this 4th day of June 2009

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2009 a copy of “STP Nuclear Operating Company’s Motion to Strike Portions of Petitioners’ Reply” was served by the Electronic Information Exchange on the following recipients:

Administrative Judge
Michael M. Gibson, Chair
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mmg3@nrc.gov

Administrative Judge
Dr. Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Administrative Judge
Dr. Randall J. Charbeneau
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Randall.Charbeneau@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Sara B. Kirkwood
James Biggins
Jessica Bielecki
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
E-mail: Sara.Kirkwood@nrc.gov
James.Biggins@nrc.gov
Jessica.Bielecki@nrc.gov

Robert V. Eye
Counsel for the Petitioners
Kauffman & Eye
112 SW 6th Ave., Suite 202
Topeka, KS 66603
E-mail: bob@kauffmaneye.com

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Signed (electronically) by Steven P. Frantz

Steven P. Frantz
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Counsel for STP Nuclear Operating Company