LBP-10-06

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

Dr. Paul B. Abramson, Chairman
Dr. Michael F. Kennedy
Dr. Jeffrey D. E. Jeffries

In the Matter of SOUTH CAROLINA ELECTRIC & GAS COMPANY AND SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (ALSO REFERRED TO AS SANTEE COOPER) (Virgil C. Summer Nuclear Station, Units 2 and 3)	Docket Nos. 52-027-COL and 52-028-COL ASLBP No. 09-875-03-COL-BD01 March 17, 2010

MEMORANDUM AND ORDER ON REMAND
(Denying on Remand the Sierra Club and Friends of the Earth's Petition to Intervene)

I. INTRODUCTION

In LBP-09-2, we issued our ruling on two petitions to intervene regarding South Carolina Electric & Gas Company's (SCE&G) application to the Nuclear Regulatory Commission (NRC) on behalf of itself and the South Carolina Public Service Authority (also referred to as Santee Cooper) for a combined license (COL) under 10 C.F.R. Part 52 that would authorize SCE&G to construct and operate two new Westinghouse Electric Corporation AP1000 advanced pressurized water nuclear power reactor units on its existing Virgil C. Summer site, which is located in Fairfield County, South Carolina.[1] We found that Friends of the Earth (FOE), which jointly filed a petition with the Sierra Club, and individual petitioner Joseph Wojcicki lacked

[1] LBP-09-2, 69 NRC 87 (2009).

standing to participate in this proceeding.[2] Additionally, we found that neither petition set out any admissible contention.[3]

In CLI-10-1, the Commission, responding to appeals from Mr. Wojcicki, and from the Sierra Club and FOE, filing jointly, affirmed LBP-09-2 in part, reversed it in part, and remanded the case in part to this Board.[4] More particularly, the Commission reversed the Board's ruling regarding FOE's standing and remanded for reconsideration the Board's determination regarding admissibility of Part B of environmental Contention 3 (Contention 3B) submitted by the Sierra Club and FOE.[5] The Commission additionally determined that, should the Board hold on reconsideration that Contention 3B presented an admissible contention, it should reconsider its rulings regarding the admissibility of Parts F and G of Contention 3.[6]

Contention 3B provides as follows:

> With respect to Chapter 9 of the [Environmental Report (ER)], 'Proposed Action Alternatives,' the Applicant almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management.[7]

For the reasons set forth below, we hold that Contention 3B fails to present an admissible contention. Further, having reconsidered Contention 3 Parts F and G in accordance with the Commission's direction, we also conclude that those portions of Contention 3 are inadmissible.

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[2] Id. at 93-94.

[3] Id. at 113.

[4] CLI-10-1, 71 NRC __ (slip op.) (Jan. 7, 2010).

[5] Id. at __ (slip op. at 6-8, 29).

[6] Id. at __ (slip op. at 30-32).

[7] Petition to Intervene and Request for Hearing by Sierra Club and [FOE] (Dec. 8, 2008) at 34 [hereinafter Petition].

II. ANALYSIS

A. Legal Standards

The conditions for admission of a contention are "strict by design";[8] for a contention to be admissible it must satisfy, without exception, each of the criteria set out in 10 C.F.R. § 2.309(f)(1)(i) through (vi).[9] Mere notice pleading is insufficient.[10]

For a contention to be admissible, under 10 C.F.R. § 2.309(f)(1), it must

> (i) Provide a specific statement of the issue of law or fact sought to be raised . . .;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requester/petitioner intends to rely to support its position on the issue; [and]
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> (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. . . . includ[ing] references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law,

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[8] Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), petition for reconsideration denied, CLI-02-1, 55 NRC 1 (2002)); see also Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC __, __ (slip op. at 10) (Mar. 11, 2010). This principle is expressly reaffirmed in the Remand Order itself. See CLI-10-1, 71 NRC at __ (slip op. at 8).

[9] See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

[10] Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003); Oyster Creek, CLI-06-24, 64 NRC at 119.

the identification of each failure and the supporting reasons for the petitioner's belief.[11]

These requirements have been further explained through the Commission's case law. Of particular relevance to our determination of the admissibility of Contention 3B are the following:

1. Materiality

In order to be admissible, a contention must assert an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding."[12] Thus, the petitioner must show that "the subject matter of the contention would impact the granting or denial of a pending license application."[13] "Materiality" requires a showing that the alleged error or omission is of possible significance to the result of the proceeding,[14] i.e., that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment.[15] A dispute is material "if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[16] In this particular instance, because the contention challenges the Applicant's compliance with the Commission's rules implementing NEPA, materiality relates not only to the Commission's determination

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[11] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[12] 10 C.F.R. § 2.309(f)(1)(iv).

[13] Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

[14] Id. (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Adm'r, EPA, 417 U.S. 921 (1974)).

[15] Va. Elec. & Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 315 (2008).

[16] Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (citing Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)).

regarding denial, issuance, or conditioning of the requested COL, but also to the Commission's fulfillment of its obligations under NEPA.

2. Supporting Information Comprised of Alleged Facts or Expert Opinion

Contentions must be accompanied by "a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position."[17] It is the petitioner's obligation to present the factual and expert support for its contention.[18] Failure to do so requires that the contention be rejected.[19] A contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[20] "[E]xpert 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."[21] Likewise, providing any material or document as the foundation for a contention, without setting

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[17] 10 C.F.R. § 2.309(f)(1)(v).

[18] Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007); Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff'd in part, CLI-95-10, 42 NRC 1, and CLI-95-12, 42 NRC 111 (1995); Palo Verde, CLI-91-12, 34 NRC at 155-56.

[19] Vogtle, LBP-07-3, 65 NRC at 253; Palo Verde, CLI-91-12, 34 NRC at 155-56.

[20] Fansteel, CLI-03-13, 58 NRC at 203 (quoting GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)); see also Consumers Energy Co. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 414 (2007).

[21] USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (quoting Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, aff'd, CLI-98-13, 48 NRC 26 (1998)). See also CLI-10-1, 71 NRC at __ (slip op. at 23) (affirming this Board's rejection of a contention where "Joint Petitioners' expert provided merely conclusory statements, without supporting facts or detail").

forth an explanation of its significance, is inadequate to support the admission of a contention.[22] Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner or supply information that is lacking.[23]

The foregoing discussion notwithstanding, a petitioner does not have to prove its contention at the admissibility stage.[24] That said, although a "Board may appropriately view [p]etitioners' support for its contention in a light that is favorable to the [p]etitioner,"[25] a petitioner must provide that support for his or her contention. The information, alleged facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that the petitioner does indeed supply adequate support for the contention.[26]

3. Genuine Dispute Regarding Specific Portions of the Application

A contention must "show that a genuine dispute exists . . . on a material issue of law or fact" with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for

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[22] Indian Point, LBP-08-13, 68 NRC at 63; Fansteel, CLI-03-13, 58 NRC at 204.

[23] Georgia Tech, LBP-95-6, 41 NRC at 305 (citing Palo Verde, CLI-91-12, 34 NRC at 155-56). See also Crow Butte Res., Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 552-53 (2009); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

[24] Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004); North Anna, LBP-08-15, 68 NRC at 335.

[25] Palo Verde, CLI-91-12, 34 NRC at 155; see also Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 275 (2009).

[26] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990); see also USEC, CLI-06-10, 63 NRC at 457; Shearon Harris, CLI-10-9, 71 NRC at __ (slip op. at 22).

each dispute.[27] Any contention that "fails to controvert the application,"[28] or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.[29] It is the petitioner's responsibility "to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of th[e] proceeding."[30] If a petitioner fails to offer alleged facts or expert opinion and a "reasoned statement" explaining any alleged inadequacy in the application, the petitioner has not demonstrated a genuine dispute.[31]

4. General Considerations

These standards do not, as the Commission pointed out in the Remand Order, require dispositive proof of the contention or its bases, but they do require "a clear statement as to the bases for the contention[] and . . . supporting information and references to documents and sources that establish the validity of the contention."[32] The degree of this requirement is discussed above in Paragraph A2.

Contention 3B arises under NEPA and challenges the Applicant's alternatives analysis, namely the amount of energy need reduction provided by the Applicant's demand-side management (DSM) programs and the use of that figure in the alternatives analysis, as it relates to the NRC Staff's future preparation of an environmental impact statement (EIS) for the proposed Summer Units 2 and 3. Therefore, the contention only raises a material issue if it

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[27] 10 C.F.R. § 2.309(f)(1)(vi).

[28] Crow Butte, CLI-09-12, 69 NRC at 557.

[29] See USEC, CLI-06-10, 63 NRC at 462-63 (rejecting contention asserting failure to analyze an alternative actually analyzed in the application).

[30] Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

[31] See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990).

[32] CLI-10-1, 71 NRC at __ (slip op. at 9) (citations omitted).

alleges some omission from, or inadequacy in, the ER's alternatives analysis that could result in the NRC's failure to satisfy its responsibilities under NEPA.

Under 10 C.F.R. Part 51, the NRC's regulations implementing NEPA,[33] an ER must, in relevant part, contain a "discussion of alternatives . . . sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, 'appropriate alternatives to recommended courses of action . . . .'"[34] However, the agency's NEPA responsibilities (and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51) are subject to a "rule of reason."[35]

In the context of alternatives analyses, "[a]gencies need only discuss those alternatives that are reasonable and 'will bring about the ends' of the proposed action."[36] Where the agency's action is to approve or deny a proposal by a private party, the agency should ordinarily "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project."[37] In this regard, we believe the law is clear that the NRC (and therefore this Board) defers to this Applicant's selected purpose of supplying baseload power. Nonetheless, as we re-examine Petitioners' Contention 3B, we bear in mind that the Commission, in remanding this matter to us for reconsideration, has clarified its view that:

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[33] The NRC may, and has, required applicants to supply information helpful to its (the NRC's) ability to satisfy its obligations under NEPA. See 10 C.F.R. § 51.41.

[34] Id. § 51.45(b)(3).

[35] La. Energy Servs., LP (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973).

[36] Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (quoting Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991)).

[37] Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,909 (Sept. 29, 2003) (internal quotations omitted); accord Citizens Against Burlington, 938 F.2d at 199 (''An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process.'').

(a) DSM is not a reasonable alternative for a merchant generator principally because such an applicant does not have the ability to implement such a program; but (b) DSM may not be excluded per se as part of the alternatives analysis to new generation for a fully integrated electric utility such as SCE&G in this proceeding.[38]

These principles guide our determination of the admissibility of Contention 3B.

B. Admissibility of Contention 3B (Alternatives Analysis -- Demand-Side Management)

1. General Discussion of Contention 3B and the Bases Proffered

As we noted above, Contention 3B provides as follows:

> With respect to Chapter 9 of the [Environmental Report (ER)], 'Proposed Action Alternatives,' the Applicant almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management.[39]

To the extent they intended to allege that the Applicant completely ignored DSM in its ER, Petitioners err: Section 9.2.1.3 of the ER clearly discusses DSM,[40] and the ER specifically states that the Applicant considered a 250-megawatt (MW) contribution of DSM toward future peak energy demand.[41]

Petitioners imprecisely qualify their assertion by stating that the Applicant "almost completely ignores" DSM. This could be taken to be an assertion that either:

(a) the Applicant should have attributed a higher value to DSM than the 250 MW it did consider (which is somewhat more than 20% of SCE&G's share of the proposed project); or

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[38] CLI-10-1, 71 NRC at __ (slip op. at 26).

[39] Petition at 34.

[40] [SCE&G], V.C. Summer Nuclear Station, Units 2 & 3, COL Application, Part 3, Environmental Report (Rev. 1 Feb. 2009) at 9.2-3 to -6 (ADAMS Accession No. ML090510259) [hereinafter ER]. The ER also discusses SCE&G's DSM programs as part of the "Need-for-Power" section. See id. at 8.1-4 to -5 (ADAMS Accession No. ML090510258).

[41] Id. at 8.1-5.

(b) the Applicant should have considered DSM (or additional DSM) in connection with its consideration of alternatives for the proposed project – particularly those involving combinations of generation methodologies.

From either perspective, general assertions of insufficient consideration of DSM are inadequate to raise an admissible contention.[42] To have presented an admissible contention, Petitioners needed to allege specific inadequacies in the Applicant's analysis of DSM or in its analysis of alternatives and provide some support or reasoning for any such alleged deficiencies. The statements comprising the Contention 3B supporting information in the Petition relate, with the single exception of the last assertion which we label below as D23, to the perspective presented by clause (a) above, and consist entirely of references to energy efficiency gains obtained by other entities in other situations, statements of goals of a variety of agencies, and brief summaries of the Petitioners' views of positions taken by SCE&G. None of those statements makes any effort to translate or connect that information to any program currently or potentially available to Applicant. Nor do any of those statements provide any reasoning to support Petitioners' hypothesis that SCE&G could achieve greater DSM amounts than the 250 MW it has incorporated into the load forecasts in the Application. Petitioners simply fail to connect the dots between the information supplied as support/clarification for Contention 3B and either the Application or SCE&G's potential for achieving additional DSM which Petitioners assert, broadly, to be lacking from the Application. For these reasons, as we discuss in depth below, Petitioners have not, with regard to clause (a) above, identified a genuine dispute on a material issue of law or fact,[43] demonstrated that the issue they wish to

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[42] See 10 C.F.R. § 2.309(f)(1)(v), (vi) (requiring "references to specific sources and documents" and "references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.").

[43] See id. § 2.309(f)(1)(vi).

raise is material to the findings the NRC must make regarding this Application,[44] or provided support for their premise,[45] and, with regard to clause (b) above, they have failed to raise a genuine dispute with the Applicant on a material issue.[46] For these reasons, Contention 3B is not admissible.

2. Specific Analysis of Supporting and Clarifying Statements

As support for this contention, Petitioners incorporate into their pleadings twenty-three specific assertions,[47] following nearly identically those matters set out in paragraphs 34 through 56 of the supporting Declaration of Petitioners' expert, Nancy Brockway.[48] Notwithstanding the fact that, as we discussed in the previous section, Petitioners' assertions collectively fail to raise a genuine dispute with the Application or provide adequate support for Petitioners' position, we examine each specific assertion, both separately and as it might be combined with the other assertions, to determine whether it provides a basis or support for the contention. For the purposes of our analysis, we identify these twenty-three assertions as items D1 through D23 below. These twenty-three assertions or statements specifically address one of two matters: (a) the amount of reduction in projected energy need due to DSM; and (b) the "Proposed Action Alternatives" analysis provided in the ER. More particularly, statements D1 through D22 all regard the amount of DSM projected by the Applicant in the ER, whereas D23 is a challenge to the Applicant's alternatives analysis. We discuss these two topics separately below.

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[44] See id. § 2.309(f)(1)(iv).

[45] See id. § 2.309(f)(1)(v).

[46] See id. § 2.309(f)(1)(iv), (vi).

[47] See Petition at 34-38.

[48] See Petition, Declaration of Nancy Brockway in Support of Petition for Intervention and Request for Hearing by the Sierra Club and [FOE] ¶¶ 34-56 (Dec. 8, 2008) [hereinafter Brockway Decl.].

Furthermore, we regroup, for the purpose of our analysis, these statements into the following particular substantive matters:

> (i) statements D6 and D9 through D22 assert alleged facts intended to support the contention as it challenges the amount of energy savings attributable to DSM;
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> (ii) statements D1 through D5, D7, and D8, when construed in a light most favorable to the Petitioners, attempt to focus or clarify the contention as it regards the assertion that SCE&G should have considered a larger contribution from DSM; and
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> (iii) statement D23, in and of itself, is an assertion that the Application should have considered alternatives to the proposed project available through other means of generation coupled with additional DSM.

In accord with accepted practice among licensing boards, endorsed by the Commission,[49] we examine the assertions to determine if individually or in the aggregate they provide the requisite support, or focus and clarify Contention 3B such that it presents an admissible contention.

a. Statements D1-D22 Addressing Applicant's DSM Estimate

Of the twenty-two statements related to the DSM estimate, as we mentioned above, fifteen provide statements apparently intended to support the proposition made by Contention 3B (as illuminated by the focusing statements D1-D5, D7, and D8) addressing the overall DSM level considered by SCE&G in the Application. Those regard the following specific categories of information: nationwide DSM potential, DSM potential in South Carolina, DSM achievements by other utilities, residential demand response activities, and potential DSM achievements by SCE&G. We first address the fifteen supporting statements, organized by these categories, and

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[49] See, e.g., La. Energy Servs., LP (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) ("[T]he reach of a contention necessarily hinges upon its terms coupled with its stated bases," (quoting Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)); Crow Butte, CLI-09-12, 69 NRC at 553 ("As we have held, the scope of an admitted contention is defined by its bases." (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002))).

then apply those statements to the stated contention and to the focusing statements provided by Declarations D1-D5, D7, and D8 below.

i. Statements Providing Supporting Information (D6 and D9-D22)

Although none of the following statements attempts to clarify or focus Contention 3B, we consider them, individually and for collective effect, from the perspective of the information they proffer which might provide support for Contention 3B, whether considered as it is written or as it could be focused and clarified by the statements discussed below in subsection II.B.2.a.ii.

(a) Statements Addressing Nationwide DSM Potential (D9 and D22)

> D9. A number of technical potential studies of the United States economy have found that the United States could reduce energy usage by 25% on average through cost-effective efficiency.[50]

Petitioners' assertion D9 fails to indicate any link between these generalized studies and the Application that is the subject of this proceeding. Petitioners fail to indicate with any specificity how the unidentified "technical potential studies" referred to in D9 indicate energy usage could be reduced, or how, if at all, such methods might be applied by SCE&G. This generalized reference to a "number of technical potential studies" thus fails to provide any of the support needed for an admissible contention.

> D22. The National Action Plan for Energy Efficiency (NAPEE), a joint effort of the United States Environmental Protection Agency and the United States Department of Energy, along with state regulators and the electricity and gas industry, recites that well-designed energy efficiency programs "are delivering annual energy savings on the order of 1% of electricity and natural gas sales." The NAPEE can be downloaded from http://www.epa.gov/cleanrgy/documents/.[51]

Statement D22 fails to indicate how the referenced report provides any support for the proposition that some DSM potential beyond that analyzed in the Applicant's ER should have been addressed. Petitioners fail to provide any reasoning or explanation regarding how this national plan suggesting that it is possible to achieve a 1% annual reduction in energy from

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[50] Petition at 36. Brockway Decl. ¶ 42 is identical.

[51] Petition at 38. Brockway Decl. ¶ 55 is identical.

consumption of electricity and natural gas relates to a potential additional capacity reduction for SCE&G achievable from DSM. This assertion again suffers from a fundamental flaw – it fails to indicate how the referenced data correlates to any potential capacity savings – or to place it in the context of the 250 MW capacity reduction resulting from the DSM programs considered in the Application.[52] Statement D22 thus also fails to provide any of the support necessary for an admissible contention.

(b) Statements Addressing Potential DSM Achievements in South Carolina (D10, D6, D13-D16, and D18)

> D10. Having enjoyed relatively low energy prices, South Carolina has so far lagged behind the nation in its energy efficiency activities (South Carolina ranks 30th in the nation to date in commitment to energy efficiency), and thus, contrary to SCE&G's analysis, the Applicant is likely to have greater than average opportunities to reduce energy usage while maintaining end-use benefits such as cooling, light, and motor power.[53]

The bare statement that the "Applicant is likely to have greater than average opportunities to reduce energy usage," even when made by Ms. Brockway as Petitioners'

[52] Petitioners nowhere suggest that the capacity reductions which could be achieved through energy conservation programs are significant when compared to the capacity of the proposed project. For example, Petitioners suggest in D17 (which is their only statement proposing actual numerical values for an asserted reduction in generation needs by SCE&G) a 5% reduction in energy sales (not capacity), and elsewhere seem to propose that energy conservation (which we take to mean DSM, although a number of the references to which Petitioners refer regard natural gas consumption reductions as well as electricity consumption reductions) can achieve a 5% energy reduction (see D13 and D15), while SCE&G has incorporated 250 MW of peak capacity reduction via DSM into its projections. See Petition at 36-37; ER at 8.1-5. But it is not apparent, nor do Petitioners suggest any method for calculating, how an overall energy consumption reduction translates into any particular reduction in electricity use, or how such a reduced electricity use would translate into a reduced need for capacity. The concepts of energy use, electricity use, and capacity needs, while related, differ. Similarly, without detailed information on load, comparisons to overall electricity sales do not translate timing and sources into capacity needs.

[53] Petition at 36. Brockway Decl. ¶ 43 is identical.

expert, is insufficient to support admission of a contention.[54] The statement itself is speculative ("likely to have"), fails to indicate any particular "opportunities" that might be available to SCE&G, and fails to set forth, or even indicate, any relationship between South Carolina's national ranking in efficiency activities and SCE&G's particular DSM programs. This statement fails to support admission of this contention.

> D6. SCE&G in testimony filed with the South Carolina PSC in Docket 2008-196-E similarly rejected the idea that it could achieve considerable DSM energy benefits or peak load reductions using demand side management.[55]

This statement fails to raise any issue or point to any alleged facts that support the proposition that any DSM benefits could be achieved by SCE&G beyond those analyzed in the Application. It simply provides no supporting information relevant to admissibility of Contention 3B.

> D13. The South Carolina Climate, Energy and Commerce Committee (CECAC), established by the Governor of South Carolina, and comprising representatives of all key energy-using and energy-producing sectors in the state, agreed in a report issued in July 2008 that 5% of the state's energy needs could be met with energy efficiency resources by 2020, at a savings of almost $600 million, net present value.[56]

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[54] See USEC, CLI-06-10, 63 NRC at 472 ("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." (quoting PFS, LBP-98-7, 47 NRC at 181)). This principle was further clarified in a decision issued the same day as CLI-10-1, see Progress Energy Fla., Inc. (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC __, __ (slip op. at 16-17) (Jan. 7, 2010) (noting that petitioners, in contrast to the petitioner in USEC, offered sufficient expert support in the form of a declaration from their expert that explained the reasons for the expert's conclusions and cited or attached supporting documents), and has been stated in other licensing board decisions, see, e.g., Vogtle, LBP-07-3, 65 NRC at 253 ("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"); Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 358 (2006) ("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 its ability to make the necessary, reflective assessment of the opinion'" (quoting USEC, CLI-06-10, 63 NRC at 472)).

[55] Petition at 35-36. Brockway Decl. ¶ 39 is identical.

[56] Petition at 36-37. Brockway Decl. ¶ 46 is identical.

This statement asserts findings from a report concerning state-wide energy efficiency potential, but fails to relate those findings to the Application, and fails to indicate how the findings it attributes to this report indicate that, as the contention appears to assert, the Applicant could achieve more DSM than it has incorporated in its analysis. Once again, Petitioners fail to draw any connection between the generalized results they attribute to the report and either some failure of the analysis in the Application or any error or omission from SCE&G's programs, and fail to provide any reasoning to support the relevance of this report to SCE&G's programs or the analysis set out in the Application. Statement D13 therefore fails to support an admissible contention disputing the contents of the Application.

> D14. The CECAC agreed that a 1% annual target of improvement in energy use efficiency was reasonable and achievable in the near term.[57]

> D15. CECAC adopted a policy goal of 5% energy efficiency savings by 2020, for recommendation to the legislature.[58]

Statements D14 and D15 both simply assert that CECAC has established certain energy efficiency targets, but neither identifies any particular measure (whether discussed in the CECAC report or not) that has been proposed for, or could be implemented by, SCE&G, nor do Petitioners provide any reasoning why they believe these targets can be met by SCE&G. Neither of these statements provides any information to support the proposition set out in Contention 3B that SCE&G "almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management. . . ." They thus fail to provide support for an admissible contention.

> D16. The CECAC produced a supply curve of low- and no-carbon resources in South Carolina, which shows that energy efficiency could eliminate up to 8

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[57] Petition at 37. Brockway Decl. ¶ 47 is identical.

[58] Petition at 37. Brockway Decl. ¶ 48 is identical.

> percent of net [greenhouse gas (GHG)] in 2020, at a net cost savings relative to the generation alternative.[59]

Petitioners here fail to provide any reasoning which might translate the projected reduction in greenhouse gases achievable through energy efficiency into a potential improvement in DSM by SCE&G. While we might infer a connection between the two principles, in the absolute absence of any suggested correlation, this Board is unable to deduce any particularized suggested potential improvement from DSM, nor are we permitted to supply that missing link.[60] Petitioners simply fail to identify any particular energy efficiency methods identified or discussed in the studies underlying this CECAC curve that could be applied generally or specifically to the Applicant's programs, and fail to indicate how such possibilities relate to the capabilities of SCE&G. As a result, statement D16 fails to provide support for admission of Contention 3B.

> D18. SCE&G participated fully in the CECAC deliberations, and did not publicly disagree with its recommendations (although it sent a letter to the CECAC chair disavowing its support of the July 2008 Final Report).[61]

These alleged facts fail to provide any support for Petitioners' contention as it regards the amount of DSM considered by SCE&G in the Application. Statement D18 fails to support admission of Contention 3B.

(c) Statements Addressing DSM Achievements by Other Utilities (D19 - D21)

> D19. Duke Energy has forecast that it could produce energy resources using efficiency amounting to 1% per year of its load in the Carolinas.[62]

> D20. Xcel Energy in Colorado has recently agreed to achieve savings of 1.4% by 2013.[63]

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[59] Petition at 37. Brockway Decl. ¶ 49 is identical.

[60] See supra note 23 and accompanying text.

[61] Petition at 37. Brockway Decl. ¶ 51 is identical.

[62] Petition at 37. Brockway Decl. ¶ 52 is identical.

[63] Petition at 38. Brockway Decl. ¶ 53 is identical.

> D21. According to data from 2006 filed with the Energy Information Administration, a number of large utilities have achieved efficiency savings of 1% or more annually. Massachusetts Electric achieved a reduction of just under 2% in 2006. Since 2006, utilities and others have developed innovative designs for energy efficiency programs that can capture efficiency opportunities not previously available to utilities.[64]

Statements D19 through D21 point to achievements by other electricity suppliers but fail to indicate any link whatsoever to potential or proposed programs of SCE&G; they fail to indicate which specific programs might have led to such success for these utilities or whether any such programs have been or could be implemented by SCE&G. These statements fail to provide any supporting information which correlates the energy efficiencies achieved at these utilities to any achievable by SCE&G or to any incremental capacity reductions which SCE&G might achieve from such incremental energy efficiencies, or to provide any reasoning to support a belief that the DSM estimate provided in the Application is too small. Statements D19 through D21, therefore, severally and collectively, fail to support an admissible contention challenging the Applicant's DSM analysis.

(d) Statements Addressing Residential Demand Management (D11 and D12)

> D11. Other utilities in the Southeastern region of the United States have had great success involving residential customers in direct load control programs, whereby participating customers' air conditioning load is cycled off during peak days, contributing significantly to peak load reductions while not inconveniencing such customers unduly (participants receive benefits for participating).[65]

This statement, when construed in a light most favorable to Petitioners, implies that the ER does not address direct load control programs for residential customers. However, to begin with, this statement provides no information regarding which particular other utilities it is referencing or how much demand reduction those other utilities achieve specifically through

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[64] Petition at 38. Brockway Decl. ¶ 54 is identical.

[65] Petition at 36. Brockway Decl. ¶ 44 is identical.

residential direct load control programs. Here again Petitioners have not suggested any correlation between the programs it references and any particular amount of demand reduction which might be possible for SCE&G to achieve – in this instance through residential direct load control programs. Additionally, even the combination of this statement with statements D19 through D21, which discuss total DSM energy savings at other utilities, does not support the proposition that residential direct load programs could result in additional energy savings to SCE&G because those statements also fail to indicate the amount of energy savings attributable to residential direct load control programs. Thus, statement D11 does not provide an adequate basis or support for an admissible contention.

> D12. The potential for greater demand response among residential customers has recently been recognized by the South Carolina Public Service Commission.[66]

This statement similarly fails to relate the asserted South Carolina Public Service Commission view to any existing SCE&G program, any alleged flaw in SCE&G's ER analysis of its existing programs, or any specific new program SCE&G might use to achieve additional energy savings or reduced capacity needs. Statement D12 fails to support admissibility of Contention 3B.

(e) Statement Addressing DSM Benefits to SCE&G (D17)

> D17. By 2020, under the Company's load forecast filed in this docket, the Company's sales are projected to be 30,599 gigawatthours. A 5% reduction in sales made possible by efficiency would lower that forecast by 1530 gWh, or a significant portion of the roughly 9600 gWh[*] that SCE&G claims it will receive from its share of the proposed two units at the Summer Station.[67]

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[66] Petition at 36. Brockway Decl. ¶ 45 is identical.

[*] The SCE&G share of the output of Summer Units 2 and 3 is calculated by multiplying 1.218 gW (SCE&G's share of the plants) by 90% (SCE&G's forecast capacity factor) by 8760 hours in a year.

[67] Petition at 37. Brockway Decl. ¶ 50 is identical, including the footnoted material.

Petitioners here simply provide a sample computation of the effects of a 5% reduction in energy sales by 2020, applying, perhaps (though without indicating that this is the case), the 5% energy conservation goal they attribute to CECAC in D15. This statement fails to discuss or even indicate any programs or measures being implemented (or not being implemented) by the Applicant that might be possible or feasible for the Applicant to achieve a reduced need for capacity. Nor does it explain, or provide any reasoning suggesting, a correlation between the suggested 5% reduction in energy sales and any reduced need for capacity from the proposed baseload project or how or why the referenced 5% reduction in energy sales differs from, or might correlate to, the 250 MW peak demand reduction which the Applicant has assumed it will get from DSM. Further, even assuming, in an abundance of caution, that it was implied by this statement, or by the collective effect of all supporting statements, Petitioners provide no information to indicate how an additional 5% reduction in energy sales beyond the amount accounted for in the Application through the DSM programs would be achievable. Statement D17 therefore fails to support admission of Contention 3B.

ii. Statements Clarifying or Focusing Contention 3B (D1 - D5, D7 and D8)

We consider each of the following statements to, rather than providing information which might support admission of Contention 3B, assert particular challenges to the Application, and therefore could provide some clarification and focus to Contention 3B.

> D1. SCE&G in its ER dismisses the possibility of alternatives to building two new nuclear generating plants, and undervalues the alternatives. In particular, SCE&G does not take demand side management or renewable sources of generation seriously, and overstates the risks associated with such resources, even as it understates the uncertainties associated with its chosen resource plan. As a result, SCE&G's resource plan is flawed and does not support its conclusion that Summer Units 2 and 3 are the least cost most reliable plan to provide resources for its customers.[68]

[68] Petition at 34-35. Brockway Decl. ¶ 34 is substantively identical except that the phrase "are the least cost most reliable" is replaced with the phrase "represent the least cost and most reliable."

The assertion that SCE&G "dismisses" or "undervalues" the alternatives and "overstates the risks' and understates the uncertainties" and the conclusory statement that "SCE&G's resource plan is flawed" are bare and unsupported – even when considered in light of the supporting statements discussed above – failing to point to any particular instance in, or reason for Petitioners' belief of such a shortcoming in, the content of the Application. As the Commission affirmed in CLI-10-1, "such general assertions, without some effort to show why the assertions undercut findings or analyses in the ER, fail to satisfy the requirements of Section 2.309(f)(1)(vi)."[69] Thus, this statement fails to clarify Contention 3B to a level that any genuine dispute exists with the Application or that any issue exists that is material to the findings the NRC must make vis-à-vis the granting, denial, or conditioning of the COLA or the NRC's NEPA alternatives analysis. Therefore, statement D1, as it is supported by the other statements, does not focus or clarify Contention 3B to make it an admissible contention.

> D2. With respect to demand side management, SCE&G utterly dismisses the potential for DSM to produce resource benefits for customers and reduce the need or push off the timing of desirable generation additions.[70]

This statement is contradicted by the fact that the Applicant's ER not only discusses DSM but specifically notes that "SCE&G's load management program reliably reduces the system's peak demand by approximately 250 MW of capacity. SCE&G uses this figure to forecast its firm peak demand for planning purposes."[71] The Petitioners do not explain how, in light of this statement, they reason that SCE&G has "utterly dismisse[d]" the potential benefits of DSM. Additionally, as with item D1, above, the assertion that "SCE&G utterly dismisses . . . ," even when considered in light of the supporting statements, is bare and conclusory and is not adequately supported by alleged facts. Further, to the extent that this challenge asserts that

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[69] CLI-10-1, 71 NRC at __ (slip op. at 28).

[70] Petition at 35. Brockway Decl. ¶ 35 is identical.

[71] ER at 8.1-5.

DSM "pushes off" the need for the proposed project, it, in substance, amounts to a challenge to the need for power analysis which we discuss and reject below.[72] Thus statement D2, as illuminated by the supporting statements, fails to clarify or focus Contention 3B such that it raises a genuine dispute with the Application.

> D3. In its Environmental Report, SCE&G's discussion of demand side management is limited to a few paragraphs, in which the Applicant names what it calls conservation programs and load management programs, whereas the conservation programs are not well-designed and will not achieve significant efficiency as currently designed (regardless of budget)[73]

No material issue is raised by the statement that the discussion of DSM is limited to a few paragraphs. The bare assertion that "the conservation programs are not well designed and will not achieve significant efficiency" is unsupported by any alleged facts (and the fact that it is made by Petitioners' expert also fails to elevate it to the requisite level of support because it is equally bare in that expert's affidavit), fails to make any particularized challenge to the Application, and fails to provide any reasoning for the belief it asserts. Statement D3 fails to clarify or focus Contention 3B to make it admissible.

> D4. and the load management programs are limited to voluntary reductions by large customers, and ignore the potential for load reduction and shifting from residential and small commercial air conditioning loads.[74]

Petitioners' statement here is, to a degree, expanded by its statements in D9, D11, D20, and D21. However, as we discussed above, none of those references to the programs of other electricity providers indicates how much or how those providers benefit from the potential load

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[72] See infra notes 96-97 and accompanying text.

[73] Petition at 35. Brockway Decl. ¶ 36 is identical.

[74] Petition at 35. Brockway Decl. ¶ 37 provides:

> The Company forecasts no additional load reductions from efficiency or load response programs after 2012. Its load management programs are limited to voluntary reductions by large customers, and ignore the potential for load reduction and shifting from residential and small commercial air conditioning loads. Its load management forecasts significantly understate the technical and economic potential for load management in its service area.

reductions subject of this portion of the contention, nor do any of these statements indicate how such programs might be implemented by SCE&G or how much effect they might have on SCE&G's energy demand or capacity needs.[75] Thus, they do not connect this data from other utilities to any energy demand or capacity need reduction that they assert SCE&G should have analyzed above the 250 MW discussed in the Application, nor do they indicate how any additional such reduction could materially affect the NEPA alternatives analysis for proposed Summer Units 2 and 3. Petitioners raise no correlation between their argument that SCE&G's load management programs are limited to large customers and any particular purported reduction in need for capacity that might be achieved by including the residential and small commercial air conditioning loads in an efficiency program, nor do they refer to or suggest any specific flaw or omission in SCE&G's DSM programs described in Sections 8.1.1.2 and 9.1.2.3.1 of the ER regarding residential and other conservation efforts, and Petitioners' references in D9, D11, and D19-D21 do not provide any such information. Statement D4, even when extended to the maximum level of specificity and support potentially offered by the supporting statements, therefore fails to clarify Contention 3B such that it raises a genuine dispute on a material issue of law or fact or an issue which is material to the findings the NRC must make or to the NRC's NEPA alternatives analysis. Statement D4 fails to clarify Contention 3B so that it would be admissible.

> D5. In the ER, the Company justifies its lack of projected energy efficiency and load management gains by citing the argument that "The relatively low cost of electricity in South Carolina works counter to the incentives provided in the available demand side management programs for reducing demand. Thus, given the customer growth and the low cost of electricity, the available energy savings from demand side management will not be sufficient to offset a significant portion of future demand." E.R. Para. 9.2.1.3.3. This analysis is insufficient.[76]

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[75] Also, as we noted above, generalized references fail to provide the requisite support for an admissible contention. See supra note 22 and accompanying text.

[76] Petition at 35. Brockway Decl. ¶ 38 is substantively identical, asserting "This analysis is incorrect and insufficient." (emphasis added).

The bare assertion that "this analysis is insufficient" (or, as Ms. Brockway put it, "incorrect and insufficient"), fails to supply any reasoning for that postulate, and therefore fails to provide sufficient support for an admissible contention. What is more, the statements attributing the lack of potential for DSM in SCE&G's service territory to the low cost of electricity in that territory (which are attributable not to the Applicant but to the South Carolina Energy Office (SCEO),[77] in our view directly contradict the principle for which Petitioners cite them and therefore offer no support for a proposition of an error in, or omission from, the Application. Neither Petitioners nor Ms. Brockway offer any explanation for why they believe, or reasoning to support the proposition that, the SCEO is incorrect, nor do they provide any rationale for the proposition that SCE&G's reliance on the SCEO report makes its ER discussion insufficient. Even when read in conjunction with the supporting statements, this statement does not support any claim of a specific error in the SCEO analysis or explain how any such error would affect

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[77] The ER excerpts appear to have been quoted from the following text:

> Data submittals were received from 37 of the 46 electric utilities operating in South Carolina, and 11 of the 18 natural gas suppliers operating in the state. The general findings of the survey indicate that the future of electric demand-side programs in South Carolina appears bleak, due in part to the low cost of electricity as compared with the other states. Although interest in deregulation in the state has mostly faded, there has been no corresponding renewal of interest in demand-side management programs.

South Carolina Energy Office, The Status of Utility Demand-Side Management in South Carolina, 2004 (July 2005) at vi, available at http://www.energy.sc.gov/publications/2004%20DSM%20Report.pdf.

> South Carolina ranks third in electricity consumption per capita in the U.S., and has the fifth highest residential monthly electric bill with an average of $94.95. Although the average residential rate per kWh in South Carolina is better than the average rates for 25 other states, South Carolina residential customers rank fourth in the nation in the per household amount of money spent on electricity. This greater cost of electricity is the result of high consumption levels, not high rates. Moreover, not only does South Carolina have a lower average rate per kilowatthour in the residential sector than the national average, but also in the commercial and industrial sectors as indicated in Figure 8.

Id. at 7.

the Applicant-specific DSM potential analyzed in the Application. Statement D5 thus fails to clarify, or support, Contention 3B to enable it to properly challenge the Application.

> D7. SCE&G's demand response initiatives appear to be largely directed towards large customers, such as industrial loads.[78]

First, we note that in Sections 8.1.1.2 and 9.2.1.3.1 of the ER, SCE&G explicitly address the spectrum of DSM initiatives it is taking, including initiatives directed toward residential customers. Additionally, Petitioners' vague statement to the effect that SCE&G's programs are "largely directed towards large customers" fails to indicate the relative sizes of those programmatic contributions, fails to indicate, even when taken in consideration with D1-D5 and D8, any particular shortcomings in SCE&G's other DSM programs, how the relative benefits of each might be altered, and any reasoning for their belief. Thus, as with D4 and D6, and when taken collectively with other statements, statement D7 fails to clarify or support Contention 3B such that it has the necessary substance to present an admissible challenge to the Applicant's DSM analysis.

> D8. There is much greater potential for economic energy efficiency and peak load reduction in South Carolina than reflected in SCE&G's Environmental Report.[79]

This assertion, even when viewed together with the supporting declarations, is entirely speculative and does not support any specific challenge to the Applicant's DSM analysis, and therefore fails to clarify or support Contention 3B such that it would be an admissible contention.

iii. <u>Board Conclusion Regarding Admissibility of Contention 3B As it Regards Potential for Greater DSM Achievement.</u>

The supporting statements (D6 and D9-D22) fail, when considered individually and collectively, to provide the support required for an admissible contention. These statements fail to provide any reasoning for the belief that greater DSM is achievable; fail to suggest any

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[78] Petition at 36. Brockway Decl. ¶ 40 is identical.

[79] Petition at 36. Brockway Decl. ¶ 41 is identical.

specific alternative estimate of DSM contribution that might have been evaluated in the Summer COL Application arising out of information suggested by any of the referenced reports, the referenced goals, or the general statements proffered; and fail to link the findings or suggestions of these reports, goals, or statements to any specific potential reduction in SCE&G's energy needs.[80] Petitioners fail to connect the information and assertions contained in these supporting statements to SCE&G's programs discussed in the ER (or to challenge those programs other than by bare, generalized assertions of insufficiency) or to any other possible program which Petitioners believe SCE&G might implement. These statements do not provide, individually or collectively, the requisite support, in the form of alleged facts or reasoned (as opposed to merely conclusory) expert opinion,[81] to show that Petitioners have raised a genuine dispute with the Application on a material issue of law or fact in Contention 3B either in its bare form or as it might be clarified or focused by statements D1-D5, D7, and D8.

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[80] Further, this series of statements by Petitioners plainly indicates that the concept of need for power and the use of DSM as an alternative to building additional generation capacity are inextricably linked. This principle and view are not new, as they were suggested in the Clinton ESP proceeding, see Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 245 (2004), as well as CLI-10-1, 71 NRC at __ (slip op. at 26) (observing that "SCE&G and Santee Cooper are . . . in a position to implement and promote programs such as energy conservation, efficiency and load management such that the need for additional generation capacity may be reduced, and they themselves discussed in the ER the potential for demand-side management programs to offset future demand"), wherein the Commission also observed that "[w]ith respect to the 'need for power' analysis . . . such an assessment 'should not involve burdensome attempts to precisely identify future conditions,'" and applied that principle to both market conditions and energy demand, id. at __ (slip op. at 21-23). Indeed the idea behind DSM is that one alternative to building additional generation capacity is to reduce demand so that the need is reduced. The Commission, in CLI-10-1, upheld our finding that Petitioners had not proffered an admissible contention regarding SCE&G's need for power analysis. See id. at __ (slip op. at 23). As discussed below, see infra note 96 and accompanying text, based on the information provided by the Petitioners, DSM could at most only delay the need for Summer Units 2 and 3 and therefore would not materially affect the need for power analysis.

[81] See CLI-10-1, 71 NRC at __ (slip op. at 28) ("[S]uch general assertions, without some effort to show why the assertions undercut findings or analyses in the ER, fail to satisfy the requirements of Section 2.309(f)(1)(vi).").

Furthermore, when considering the clarifications and focusing offered by statements D1-D5, D7, and D8, individually and collectively, and any support offered by Statements D6 and D9-22, Contention 3B still fails to raise an issue material to the decision the NRC must make respecting either its licensing decision or its NEPA obligations.

And, finally, all of the matters suggested, raised, or referred to in Statements D1-D22 relate to the premise that SCE&G should have considered a larger contribution of DSM in its planning, but the maximum suggested by the Petitioners is small when compared to the overall capacity of the proposed project.[82] The size of reduction in capacity needs which can rationally be associated with this small increase in DSM cannot alter the decision the NRC must make regarding issuance, conditioning, or rejection of the license; it would only serve to affect the projected timeline for SCE&G's need for the 1218 MW it will receive from the proposed project. As we discuss below,[83] when energy demand reduction through DSM is examined in the context of the need for power analysis, such challenges do not create an admissible contention. Thus, even if Contention 3B, as focused and clarified by Statements D1-22, were not inadmissible for the foregoing reasons, it is inadmissible because it raises essentially the same challenge to the

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[82] See discussion of statement D17, infra section II.B.2.a.i.(e). Statement D17 is the only statement in the Petition suggesting any demand reduction figure from DSM that can be compared with the 250 MW peak demand already discussed in the Application. None of the other percentages cited in the Petition suggests any actual reduction in demand achievable by SCE&G because the Petitioners offer no explanation of how one might translate, for example, CECAC's energy efficiency goals and targets described in statements D14 and D15 into a potential reduction in SCE&G's peak capacity needs. See also supra note 52.

[83] See infra notes 96-97 and accompanying text.

Applicant's need for power which we have previously found inadmissible, a ruling affirmed by the Commission.[84]

For the foregoing reasons, Contention 3B, even when viewed in light of these clarifying, focusing, and supporting statements, fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

b. Board Analysis of Statement D23 Addressing Applicant's Alternatives Analysis

Finally, turning to statement D23, we observe that it is capable of being interpreted to focus and clarify Contention 3B on alternatives which SCE&G was required to consider, or might have considered, but assertedly did not. Although, as discussed above, statements D1-D22 were considered as providing supporting or clarifying information regarding the amount of DSM projected by SCE&G, they did not provide any basis to support the admissibility of Contention 3B from the perspective of the asserted need to consider greater DSM contributions. Nonetheless, these statements purport to offer information regarding what others have been able to achieve for DSM-related load reductions, and for that reason, we consider them also in the context of the amount of DSM to be considered when examining Petitioners' statement D23 related to the Applicant's alternatives analysis.

> D23. The Applicant appears to argue that incremental demand side management above amounts reflected in its forecasts need not be considered as an alternative to the proposed plants unless by itself it can replace the resources represented by proposed plants. This approach would not constitute sound resource planning. Rather, all possible alternatives must be identified, and alternate scenarios, consisting of various mixes of resources and timing of resources, must be modeled to examine their net present value, given a variety

[84] See LBP-09-2, 69 NRC at 107-08 (where Petitioners challenged Applicant's need for power analysis on the basis of the current economic downturn, finding Petitioners' need for power contention to be inadmissible because it would impose "a level of detail well beyond what is required of the Agency in its analyses"); CLI-10-1, 71 NRC at __ (slip op. at 22-23) (affirming Board's conclusion that Petitioners' need for power contention called for more detailed analysis than NRC requires because, "[a]s we have stated: '[W]hile a discussion of need for power is required, the Commission is not looking for burdensome attempts by the applicant to precisely identify future market conditions and energy demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation of power.'" (quoting 68 Fed. Reg. at 55,910)).

> of input assumptions. There is no evidence that the Company has used this basic method of resource planning. If it has, it has not presented the results to this Commission in its Environmental Report, nor explained its methodology in detail and identified the specific inputs to its modeling of various scenarios.[85]

Statement D23 appears to focus upon Petitioners' view of how the Applicant should have analyzed DSM as an alternative in its ER. We view this statement as proffering a challenge to the Applicant's "Proposed Action Alternatives."[86] This portion of the support/bases for Contention 3B has two fundamental components:

a. The assertion that there is a requirement to identify and consider all possible alternatives, and

b. The assertion that Applicant has failed to consider certain alternatives that incorporate DSM along with other possible generation sources.

i. Consideration of "all possible alternatives"

Petitioners' assertion in D23 that "all possible alternatives must be identified . . . and modeled" and, impliedly, considered, has no foundation in law. As regards the general requirements for consideration of alternatives, it is well established that there is no obligation under NEPA to consider every possible alternative.[87] Thus, viewing D23 to assert that there is a requirement to examine all possible alternatives, this assertion fails to raise an issue material to the NRC's NEPA analysis and, accordingly fails to cause Contention 3B to raise an admissible contention.

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[85] Petition at 38. Brockway Decl. ¶ 56 is identical.

[86] ER chapter 9.

[87] Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), CLI-91-2, 33 NRC 61, 71 (1991) ("An agency's environmental review 'must consider not every possible alternative, but every reasonable alternative.'" (quoting Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir.1985)); see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978) ("the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man").

ii. Consideration of Alternatives Involving DSM

Regarding the consideration of specific combination alternatives, we note that the burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention.[88] A board may not supply information that is missing or make assumptions of fact not provided by the petitioner,[89] and therefore we may not assume that Petitioners intended to propose (or contend) that any particular combination should be examined if none can be discerned from the Petition.

(a) Specific Alternatives Not Addressed in the Application

In the instant circumstance, Petitioners have proposed no particular alternative that includes DSM as a component, and therefore have failed to carry their burden; as a result, Contention 3B, as clarified by D23, fails to raise a genuine dispute on a material issue of fact or law regarding a purported failure by SCE&G to consider, as an alternative to the proposed project, particular combinations of generation methodologies that include DSM as one component.

(b) Materiality of Matters Raised by Contention 3B As it Regards Alternatives Analyses

Had we found that subpart 3B of Petitioners' contention proposed a specific alternative, we would have examined whether or not, because of the small contribution to total energy

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[88] Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 158 (2005); see also Shearon Harris, CLI-10-9, 71 NRC at __ (slip op. at 26) ("The question before us . . . is whether [petitioner] has stated a contention asserting an environmentally preferable alternative to the proposed reactors."); id. at __ (slip op. at 26-28) (affirming Board ruling that petitioner had not "properly challenged" applicant's conclusion that no environmentally preferable alternative existed where "[t]he only alternative that [petitioner] mentions on appeal is the 'no reactor' option," and petitioner neither raised that option before the Board nor supported its argument that it would always be environmentally preferable); cf. Olmsted Citizens for a Better Community v. United States, 793 F.2d 201, 209 (8th Cir. 1986); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 576-77 (9th Cir. 1998).

[89] Georgia Tech, LBP-95-6, 41 NRC at 305. See also Crow Butte, CLI-09-12, 69 NRC at 552-53; MOX, LBP-01-35, 54 NRC at 422.

supply provided by even the maximum amount of DSM suggested by the pleadings, such a consideration would have been material to the decision that the NRC must make.

As an initial matter, we note that it is fundamental to the materiality of combination alternatives including DSM to examine the magnitude of the actual reduction in SCE&G's generation needs that DSM could make beyond the amount already analyzed in the Application. Applicant has stated in the Application that DSM can reduce the necessary peak power demand by approximately 250 MW[90] (which amounts, at 100% availability, to 2190 GWh per year), while Petitioners' asserted maximum contribution from DSM is 1530 GWh of the roughly 9600 GWh that SCE&G claims it will receive each year from its share of the proposed two units at the Summer Station in 2020.[91] Thus the Applicant has apparently considered DSM in a larger increment than is suggested by Petitioners. Although Petitioners imply through their assertions in D23 that some incremental additional DSM might be achieved, no information has been supplied to us to imply or indicate the amount of any such incremental improvement – or how it might affect the Applicant's conclusions regarding alternatives. This failure alone causes the assertion to fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi), failing to identify any genuine dispute with the Application on a material issue.

Additionally, it would have been, in our view, reasonable to hold that the small amount of energy savings Petitioners attribute to DSM renders DSM not material to the decision the NRC must make in this case for the following reasons:

First, as Petitioners do not dispute, and as is evident from their statement D17, DSM alone cannot replace the 2214 MWe of new generation (or SCE&G's 1218 MW share of that

[90] ER at 8.1-5.

[91] Petition at 37.

generation capacity) that would be provided by the proposed nuclear units,[92] and therefore DSM alone cannot be an alternative to the project objectives of the Applicant to generate baseload power – in this instance through its proposal to construct new nuclear units.[93]

Second, because it reduces by a small portion SCE&G's demand for power, DSM should be analyzed in this instance as a surrogate for need for power,[94] and when considered in this light, no material challenge is mounted to the Applicant's need for power analysis. SCE&G's projected energy sales, as discussed in the ER for proposed Summer Units 2 and 3, increase from 29,927 GWh in 2019 to 31,187 GWh in 2021,[95] so that an additional contribution from DSM of approximately 1500 GWh (approximately the amount suggested by Petitioners), if

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[92] See ER at 9.2-7 ("For analysis purposes, SCE&G assumed a target value of 2,214 MWe for the net electrical output from a new facility at VCSNS."); id. at 8.0-1 ("SCE&G would receive 1,218 megawatts of the net electricity generated" from proposed Summer Units 2 and 3.).

[93] The Commission has stated that "[a]gencies need only discuss those alternatives that are reasonable and 'will bring about the ends' of the proposed action," Hydro, CLI-01-4, 53 NRC at 55 (2001) (citing Citizens Against Burlington, 938 F.2d at 195), and that an agency approving or denying a proposal by a private party should ordinarily "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project," Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,909 (Sept. 29, 2003) (internal citations omitted). Nothing in CLI-10-1 suggests the contrary, particularly since the Commission affirmed the Board's ruling regarding Petitioners' renewable energy alternatives contention, noting specifically that the Petitioners admitted that wind power is intermittent and therefore cannot substitute for baseload power. See CLI-10-1, 71 NRC at __ (slip op. at 27-28). Thus, we consider the purpose of the proposed action to be supplying (whether through generation or efficiency measures) 2214 MW of baseload power. With that purpose in mind, we find nothing in Petitioners' pleadings to suggest that DSM alone could be a reasonable substitute for that amount of baseload power and therefore we find that the Petitioners have not supported a contention proposing DSM alone as an alternative.

[94] See Exelon Nuclear Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 159, aff'd, CLI-05-29, 62 NRC 801, 805-08 (2005); see also id., LBP-04-17, 60 NRC at 245.

[95] ER at 8.1-11 (Table 8.1-1).

realized, would simply result in shifting the need curve back by two years.[96] Since it is widely recognized that such projections are inherently uncertain, and the Commission is clear that it does not impose "burdensome attempts" to predict future conditions, and that it "should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions,"[97] the contribution of 1500 GWh of DSM to a reduction of need cannot be material to the decision the NRC must make, and therefore Contention 3B fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv).

(c) Environmentally Preferable NEPA Alternatives

Finally, there are generic principles at play regarding this contention:

a. the ultimate objective of the NEPA requirement to examine alternatives is to ensure the NRC has made an informed decision by examining reasonable alternatives to the proposed action; and

b. the only alternatives which are, in the end, relevant to the NRC's decision are those alternatives that are environmentally preferable; and

c. the NRC must defer to the Applicant's project purpose, which in this proceeding is to provide baseload power.[98]

These generic principles, along with the substance of Contention 3B as illuminated by the twenty-three statements, lead, inescapably, to the following conclusions. The net effect of generic principles a and b, above, is that a contention can only raise an issue material to the decision the NRC must make (i.e., satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv)) if it suggests a reasonable alternative with environmentally preferable environmental impacts. The net effect of generic principle c is that no alternative made up solely of renewable generation

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[96] In a different procedural context, the Commission has stated, "A possible one-year slip in construction schedule is clearly within the margin of uncertainty" and therefore, at least in the context of re-litigating an issue, is unlikely to affect the need for power. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

[97] CLI-10-1, 71 NRC at __ (slip op. at 21) (quoting 68 Fed. Reg. at 55,910).

[98] See supra note 93.

sources will be a reasonable alternative because renewables cannot generate baseload power, which is the goal of the proposed project.[99]

In analyzing Contention 3B, as it might be clarified or focused by D23, we begin by noting that Petitioners present absolutely no information regarding the environmental impacts of a combination alternative incorporating DSM. They have not even suggested that any particular combination of DSM and other generation technologies might have smaller environmental impacts than the proposed nuclear units, and have not alleged any facts, or offered any expert opinion, to support the proposition that some such environmentally preferable alternative exists. Thus, Petitioners have plainly failed to provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of fact or law, and failed to demonstrate that they raise an issue material to the findings the NRC must make as it proceeds to satisfy its NEPA obligations regarding examination of alternatives to the proposed nuclear project. Therefore, Contention 3B as it might be focused and clarified by D23, fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).[100]

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[99] See, e.g., Clinton, CLI-05-29, 62 NRC 801, 810 (2005) (noting that "a solely wind- or solar-powered facility could not satisfy the project's purpose" to generate baseload power); see also CLI-10-1, 71 NRC at __ (slip op. at 27) ("Joint Petitioners also renew on appeal their challenge to the adequacy of SCE&G's alternatives analysis as it relates to renewable sources of power. The Board excluded this aspect of the contention to the extent that it constituted an impermissible challenge to SCE&G's selected project purpose to generate baseload power. The Board further found that Joint Petitioners pointed to no error in the applicant's analysis of renewables, or its conclusion that the proposed alternatives cannot generate baseload power. We find that the Board did not err in excluding this portion of the contention, because Joint Petitioners have not identified a genuine dispute with SCE&G on the application.").

[100] Furthermore, where a petitioner suggests there should have been consideration of alternatives, the burden falls upon a petitioner to propose particular alternative(s) to be considered, see supra note 88, which petitioners have not done in this instance.

Finally, the project goal of the Applicant, in this case, to supply baseload power, must be deferred to by this Agency. The Applicant has identified a number of potential alternatives[101] but apparently concluded that the only viable alternative involving a renewable energy source (in this case, wind) would also require a backup fossil fuel component in order to provide baseload-type power.[102] As the Applicant discussed in its ER, fossil fuel generation would result in air emission impacts considerably larger than any expected from the proposed nuclear plants, and any other impacts would be small for both nuclear and fossil generation.[103] Any additional DSM at the level suggested by the Petitioners would serve only to reduce the requirement for the fossil fuel generation source, not to eliminate it. Thus, because all of the combination alternatives examined in the Application incorporate a fossil component (and petitioners have not suggested any other specific combination alternative), it is simply not possible for any of the combination alternatives at issue to have a smaller environmental impact than the proposed nuclear project. Thus, there could not be a finding that an environmentally preferable alternative exists which should be considered, so as to be material to the decision the NRC must make.[104] Thus, to the extent that Contention 3B presents a contention that the Applicant's ER is inadequate because it did not consider an alternative incorporating a larger DSM contribution, it fails to raise a matter material to the decision the NRC must make, thereby failing to satisfy the

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[101] See ER at 9.2-8 to -21.

[102] The Applicant discussed alternatives involving a combination of wind and either natural gas or coal. ER at 9.2-20 to -21. The Board could not discern from the Petition any additional potential alternatives involving a combination of DSM, renewables, and any load-filling generation source.

[103] See, e.g., ER at 9.2-35 to -38.

[104] The Commission has stated, "There may, of course, be mistakes in the [EIS], but in an NRC adjudication, it is Intervenors' burden to show their significance and materiality." Clinton, CLI-05-29, 62 NRC at 811. Here, Petitioners have not carried their burden because they have not shown how any of the errors they assert in the Applicant's discussion of DSM could affect the environmental impact balancing in the ER or in the Staff's EIS based on that ER.

requirements of 10 C.F.R. § 2.309(f)(1)(iv), and therefore failing to present an admissible contention.

4. Board Conclusions on Admissibility of Contention 3B

Having re-examined and reconsidered Contention 3B, including Petitioners' statements appearing to clarify and focus the contention and those purporting to lend factual or expert support to the contention, we find that Contention 3B fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi) and is therefore inadmissible.

C. Admissibility of Contention 3, Parts F and G (Alternatives Analysis – Costs)

Finally, because we hold that Petitioners have failed to propose an admissible contention asserting that there is an environmentally preferable alternative that the Applicant has failed to consider, we conclude that Parts F and G of Contention 3 (Contentions 3F and 3G) are also inadmissible. We held in LBP-09-2 that "[t]he accuracy of project cost estimates only becomes relevant if an environmentally preferable alternative has been identified" and that because neither the Applicant nor the Petitioners had identified an environmentally preferable alternative, Contentions 3F and 3G, which addressed the cost of the proposed nuclear units, did not raise an issue material to the decision the NRC must make.[105] The Commission instructed us to reconsider the admissibility of these two subparts in the event that, on remand, we found Contention 3B to be admissible because the issue of whether an alternative involving DSM is environmentally preferable to the proposed nuclear units would then be in dispute.[106] However, because we hold Contention 3B to be inadmissible, there is no potentially environmentally preferable alternative at issue in this proceeding. Therefore we conclude that Parts F and G of Contention 3 are inadmissible.

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[105] LBP-09-2, 69 NRC at 112.

[106] See CLI-10-1, 71 NRC at __ (slip op. at 31).

III. CONCLUSION

Although the Sierra Club and FOE have standing to intervene in this proceeding, they have not submitted an admissible contention under the requirements of 10 C.F.R. § 2.309(f)(1). Thus, the hearing petition of the Sierra Club and FOE is denied.[107]

IV. ORDER

For the foregoing reasons, it is this 17th day of March 2010, ORDERED that:

1. The Sierra Club and FOE's Contention 3, parts B, F, and G are inadmissible.
2. The Petition to Intervene of the Sierra Club and FOE is denied, and the proceeding is terminated.
3. The request of SC ORS to participate in this proceeding as an interested governmental entity under 10 C.F.R. § 2.315(c) is denied as moot.

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[107] Because the Commission upheld the Board's finding that Joseph Wojcicki lacked standing to participate in this proceeding, see CLI-10-1, 71 NRC at __ (slip op. at 5-6), our denial of his petition to intervene still stands. Additionally, because we deny the petition of the Sierra Club and FOE, the request of the South Carolina Office of Regulatory Staff (SC ORS) to participate in the proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.315(c) is denied as moot.

4. In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission of the outcome of this Memorandum and Order shall be taken within ten (10) days of the date it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD[108]

/RA/

Dr. Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. Jeffrey D. E. Jeffries
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 17, 2010

[108] A copy of this Memorandum and Order was sent this date by the Agency's E-Filing System to: (1) Counsel for the Staff; (2) Counsel for SCE&G; (3) Sierra Club and Friends of the Earth; (4) SC ORS; and (5) Joseph Wojcicki.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
SOUTH CAROLINA ELECTRIC	)	Docket Nos. 52-027-COL
AND GAS COMPANY, ACTING FOR ITSELF	)	52-028-COL
AND AS AGENT FOR THE SOUTH CAROLINA	)	
PUBLIC SERVICE AUTHORITY (ALSO	)	
REFERRED TO AS SANTEE COOPER)	)	
	)	
(Virgil C. Summer Nuclear Station	)	
Units 2 and 3)	)	
	)	
(Combined Operating License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER ON REMAND (DENYING ON REMAND THE SIERRA CLUB AND FRIENDS OF THE EARTH'S PETITION TO INTERVENE) (LBP-10-06) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of March 2010