

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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| In the Matter of |) | |
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| SOUTH CAROLINA ELECTRIC & GAS |) | Docket Nos. 52-027-COL and 52-028-COL |
| COMPANY AND SOUTH CAROLINA |) | |
| PUBLIC SERVICE AUTHORITY (ALSO |) | April 5, 2010 |
| REFERRED TO AS SANTEE COOPER) |) | |
| |) | |
| (Virgil C. Summer Nuclear Station Units 2 |) | |
| and 3) |) | |

**SOUTH CAROLINA ELECTRIC & GAS COMPANY BRIEF IN OPPOSITION TO
SIERRA CLUB AND FRIENDS OF THE EARTH APPEAL FROM LBP-10-6**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.311(b), South Carolina Electric & Gas Company (“SCE&G”) submits this brief in opposition to the Notice of Appeal and Brief on Appeal (“Appeal”) filed by Sierra Club and Friends of the Earth (“FOE”) (collectively, “Petitioners”),¹ of the March 17, 2010 Memorandum and Order on Remand issued by the Atomic Safety and Licensing Board (“Board”).² In its March 17th Order on Remand, the Board reconsidered the admissibility of Subparts B, F, and G of Contention 3, in light of the Commission’s January 7, 2010 Memorandum and Order, which affirmed in part, reversed in part, and remanded portions of the Board’s earlier decision ruling on Petitioners’ December 9, 2008 Petition to Intervene

¹ Notice of Appeal by Sierra Club and Friends of the Earth (Mar. 26, 2010); Brief on Appeal of Sierra Club and Friends of the Earth (Mar. 26, 2010).

² Memorandum and Order on Remand (Denying on Remand the Sierra Club and Friends of the Earth’s Petition to Intervene), LBP-10-6, 71 NRC ___, slip op. (Mar. 17, 2010) (“LBP-10-6” or “Order on Remand”).

(“Petition”).³ On remand, the Board followed the Commission’s instructions to reassess the admissibility of Subpart B of Contention 3 and found that Petitioners failed to present an admissible contention.⁴ Consistent with the Commission’s Order, the Board, relying on the rationale in LBP-09-2, then rejected Subparts F and G of Contention 3.⁵ Following this reevaluation, the Board, in turn, denied the Petition. On March 26, 2010, Petitioners appealed the Board’s decision, asking the Commission to overturn the Board’s Order on Remand and grant their Petition.

As discussed more fully below, the Board appropriately denied the Petition because Subparts B, F, and G of Contention 3 do not meet the Commission’s criteria for an admissible contention set forth in 10 C.F.R. § 2.309(f)(1).⁶ On appeal, Petitioners improperly seek reconsideration of the Commission’s earlier decision affirming the rejection of those portions of Contention 3 that were not the subject of the remand. Petitioners also improperly attempt to provide new supporting evidence for the first time on appeal. Moreover, despite the thorough and well-reasoned decision in LBP-10-6 addressing the Commission’s remand, Petitioners fail to identify any error of law or abuse of discretion in the Board’s conclusion that Subparts B, F, and G of Contention 3 failed to satisfy the NRC’s contention admissibility requirements. Accordingly, the Commission should deny the Appeal and affirm the Board’s decision.

³ Memorandum and Order, CLI-10-1, 71 NRC ___, slip op. (Jan. 7, 2010) (“CLI-10-1” or “Commission Order”), *aff’g in part, rev’g in part, & remanding*, Order (Ruling on Standing and Contention Admissibility), LBP-09-2, 69 NRC 87 (2009) (“LBP-09-2”); Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth (Dec. 9, 2008) (“Petition”). Although the first page of the Petition bears a date of December 8, 2008, the Certificate of Service certifies that service was made on December 9, 2008. Petition at 49.

⁴ LBP-10-6, slip op. at 9-36.

⁵ *Id.* at 36.

⁶ CLI-10-1 affirmed the Board’s decision rejecting other Subparts of Contention 3, as well as the denial of Contentions 1 and 2. Thus, there was no reason for the Board to address Subparts A, C, D, and E of Contention 3 on remand.

II. PROCEDURAL HISTORY

This proceeding involves SCE&G's application to the U.S. Nuclear Regulatory Commission ("NRC") for combined licenses ("COLs") to construct and operate two Westinghouse AP1000 pressurized water reactors at the Virgil C. Summer Nuclear Station ("VCSNS") site in Fairfield County, South Carolina. In response to a Hearing Notice published in the *Federal Register*,⁷ Sierra Club and FOE timely filed a joint Petition to Intervene in this COL proceeding on December 9, 2008. The Petition proposed three contentions, including Contention 3 which presented a broad amalgam of claims purporting to challenge the discussion in SCE&G's Environmental Report ("ER") of the need for power and the costs of and alternatives to the proposed action.⁸ Both SCE&G and the NRC Staff, in their respective Answers, opposed the Petition on the grounds that the Petitioners failed to proffer an admissible contention.⁹

In its February 18, 2009 decision in LBP-09-2, the Board denied the Petition because Petitioners failed to submit an admissible contention.¹⁰ On February 27, 2009, Petitioners appealed LBP-09-2 to the Commission, arguing, among other things, that the Board erred in

⁷ Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 60,362 (Oct. 10, 2008) ("Hearing Notice").

⁸ A declaration supporting, *inter alia*, Proposed Contention 3 accompanied the Petition. Declaration of Nancy Brockway in Support of Petition for Intervention and Request for Hearing by the Sierra Club and Friends of the Earth (Dec. 9, 2008) ("Brockway Declaration").

⁹ South Carolina Electric & Gas Company's Answer Opposing the Petition to Intervene of Sierra Club and Friends of the Earth (Jan. 5, 2009) ("SCE&G Answer"); NRC Staff Answer to "Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth" (Jan. 5, 2009).

¹⁰ LBP-09-2, slip op. at 2, 28.

finding Contention 3 inadmissible.¹¹ SCE&G and NRC Staff filed respective briefs opposing this appeal.¹²

On January 7, 2010, the Commission issued CLI-10-1, which affirmed in part, reversed in part, and remanded portions of LBP-09-2.¹³ The Commission upheld the Board's rejection of Subparts A, C, D, and E of Contention 3, and thus affirmed the Board's denial of Petitioners' arguments relating to need for power, renewable energy alternatives, modular alternatives, and rate increases, respectively.¹⁴ Thus, the Commission made clear that, aside for the remanded portions of Contention 3, it "identified no error in the Board's decision to reject the balance of Contention 3, and . . . decline[d] to disturb its ruling further."¹⁵

However, the Commission reversed the Board's *per se* rejection of Petitioners' demand-side management ("DSM") arguments that were set forth in Subpart B of Contention 3.¹⁶ The Commission found that the Board improperly relied on the *Clinton* early site permit decision as a basis for excluding Petitioners' DSM arguments.¹⁷ "[U]nlike *Clinton*, this case involves an application to produce baseload power for a defined service area" and thus, the Commission found "that NEPA's 'rule of reason' would not exclude consideration of demand-side

¹¹ Brief on Appeal of Sierra Club and Friends of the Earth (Feb. 27, 2009) ("First Appeal").

¹² South Carolina Electric & Gas Company's Brief in Opposition to Sierra Club and Friends of the Earth Appeal from LBP-09-2 (Mar. 9, 2009) ("SCE&G Opposition to First Appeal"); NRC Staff Brief in Opposition to Appeal of LBP-09-2 by Sierra Club and Friends of the Earth (Mar. 9, 2009).

¹³ CLI-10-1, slip op. at 2, 32-33. Unrelated to the instant appeal, the Commission also reversed the Board's ruling with respect to the representational standing of FOE, determining that FOE had satisfied the Commission's requirements in this regard. *Id.* at 6-8.

¹⁴ *Id.* at 21-23 (affirming Board's denial of need for power aspects of Contention 3), 27-28 (affirming Board's rejection of renewable energy alternatives portion of Contention 3), 28-29 (affirming Board's exclusion of modular alternatives basis of Contention 3), 32 (affirming "Board's decision to reject the balance of Contention 3"); *see id.* at 18-19.

¹⁵ *Id.* at 32.

¹⁶ *Id.* at 25-27.

¹⁷ *Id.* at 26.

management as part of an alternatives analysis per se.”¹⁸ The Commission did not, however, admit Subpart B but instead remanded Subpart B for the Board’s further evaluation in accordance with the contention admissibility standards in 10 C.F.R. § 2.309(f)(1).¹⁹

The Commission also reversed and remanded the Board’s denial of Petitioners’ arguments on SCE&G’s estimates of construction and operating costs set forth in Subparts F and G of Contention 3, finding that these arguments might become relevant *if* Subpart B was first found to be admissible.²⁰ Referring to the Atomic Safety and Licensing Appeal Board (“Appeal Board”) *Midland* decision, the Commission explained that cost issues are only relevant if an environmentally preferable alternative is identified.²¹ Given the remand of Subpart B—which, if found admissible, might involve the identification of an environmentally preferable alternative—the Commission found it premature to exclude Subparts F and G.²² The Commission concluded, nonetheless, that “[s]hould the Board exclude Subpart 3B as inadmissible, . . . its stated rationale for Subparts 3F and 3G would form a valid basis for excluding these claims.”²³

Following the remand, the Board issued a detailed decision that found Subpart B of Contention 3 to be inadmissible.²⁴ After thoroughly explaining why Subpart B failed to satisfy 10 C.F.R. § 2.309(f)(1),²⁵ the Board followed the Commission’s direction and rejected

¹⁸ *Id.*

¹⁹ *Id.* at 25-27.

²⁰ *Id.* at 31-32.

²¹ *Id.* at 31 (citing *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978)).

²² *Id.*

²³ *Id.* at 32 n.118.

²⁴ LBP-10-6, slip op. at 2, 36-37.

²⁵ *Id.* at 9-36.

Subparts F and G of Contention 3.²⁶ On March 26, 2010, Petitioners appealed LBP-10-6 to the Commission. SCE&G hereby opposes Petitioners' Appeal.

III. STANDARD OF REVIEW

“An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.”²⁷ In ruling on such an appeal, however, the Commission gives “substantial deference” to Board determinations on standing and contention admissibility.²⁸ Thus, “the Commission affirms Board rulings on admissibility of contentions if the appellant ‘points to no error of law or abuse of discretion.’”²⁹

Abuse of discretion is a “high standard of review.”³⁰ A petitioner has a “heavy burden” on appeal to establish that reversal of a Board decision is warranted.³¹ Significantly, consistent with this standard, “[t]he appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”³² Accordingly, the Commission will reject an appeal where the appellant “has failed . . .

²⁶ *Id.* at 36.

²⁷ 10 C.F.R. § 2.311(c).

²⁸ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *see also Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC ___, slip op. at 10, 39 (Mar. 11, 2010).

²⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-04-36, 60 NRC 631, 637 (2004) (quoting *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)).

³⁰ *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 718 (2006).

³¹ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-918, 29 NRC 473, 482 (1989).

³² *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

to address adequately (if at all) the Board’s grounds for refusing to admit” the contention³³ or where the appellant simply repeats claims previously rejected by the Board.³⁴

Furthermore, in performing its appellate review role, the Commission will not consider “new arguments or new evidence supporting the contention[s], which the Board never had an opportunity to consider.”³⁵ Raising new issues on appeal is especially inappropriate when “the issue and factual averments underlying it could have been—but were not—timely put before the Licensing Board.”³⁶

As discussed in detail below, Petitioners here (1) improperly seek reconsideration of the Commission’s decision affirming the rejection of those portions of Contention 3 that were not the subject of the remand; (2) improperly provide new supporting evidence for the first time on appeal; and (3) fail to point to any error of law or abuse of discretion in the Board’s decision finding the remanded portions of Contention 3 inadmissible. Therefore, the Appeal should be denied and the Board’s Order affirmed.

IV. PETITIONERS HAVE IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION IN THE BOARD’S ORDER ON REMAND

A. Petitioners Improperly Seek Reconsideration of CLI-10-1

Although Petitioners style the instant pleading as an appeal, in substance, Petitioners, at least in part, seek reconsideration of CLI-10-1. As noted above, that Commission Order affirmed the Board’s earlier rejection of four important aspects of Contention 3. Specifically, the Commission denied Petitioners’ arguments relating to need for power, renewable energy alternatives, modular alternatives, and rate increases—arguments corresponding to Subparts A,

³³ *Millstone*, CLI-04-36, 60 NRC at 637.

³⁴ *PPL Susquehanna LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-07-25, 66 NRC 101, 104-06 (2007).

³⁵ *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (citations omitted).

³⁶ *See P.R. Elec. Power Auth.* (N. Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981).

C, D, and E of Contention 3, respectively.³⁷ The Commission Order remanded only a narrow issue to the Board for evaluation—namely, the admissibility of Subpart B, in light of the Commission’s direction regarding the inapplicability of the *Clinton* decision in these circumstances.³⁸ Although CLI-10-1 also remanded Subparts F and G, the Commission made clear that if Subpart B were found inadmissible, the Board’s prior rationale following the *Midland* decision “would form a valid basis for excluding these claims.”³⁹

Despite the clear terms of the Commission Order and the limited scope of the remand and subsequent Board decision in LBP-10-6, Petitioners improperly attempt to reargue the admissibility of Subparts A, C, D, and E of that Contention by “copying and pasting” their previously-rejected arguments relating to need for power,⁴⁰ renewable energy alternatives,⁴¹ modular alternatives,⁴² and rate increases.⁴³ In fact, almost every argument in the Appeal Brief is copied virtually verbatim from Petitioners’ First Appeal Brief.⁴⁴ In similar circumstances, the

³⁷ CLI-10-1, slip op. at 21-23 (affirming Board’s denial of need for power aspects of Contention 3), 27-28 (affirming Board’s rejection of renewable energy alternatives portion of Contention 3), 28-29 (affirming Board’s exclusion of modular alternatives basis of Contention 3), 32 (affirming “Board’s decision to reject the balance of Contention 3”).

³⁸ *Id.* at 27, 29.

³⁹ *Id.* at 31-32.

⁴⁰ *See, e.g.*, Appeal at 9-10 (“[T]he Board eliminates any fair consideration of the need for that capacity or the alternative means of providing for South Carolina’s energy future.”).

⁴¹ *See, e.g., id.* at 14 (“The Licensing Board does not even pause to consider these disputed claims; but, again, summarily dismisses consideration of renewable alternative power sources as irrelevant to the artificially narrow project purpose of providing base-load power.”), 20 (“Wind, especially the off-shore wind cited by Petitioners, produces no emissions. Solar power produces no emissions.”).

⁴² *See, e.g., id.* 13-14 (“Board fails to acknowledge Sierra and FOE’s claims and supporting expert opinion evidence that the Applicant has failed in its ER to determine its reasonably likely load requirements net of these modular, alternative options, before making the commitment of billions of dollars to the one nuclear option.”), 18-20 (“[T]he failure to consider a more modular approach to adding resources renders the ER inadequate to capture the relevant considerations in choosing a resource acquisition objective.”).

⁴³ *See, e.g., id.* at 19 (“[R]ates will be considerably higher as the estimate is adjusted to a higher, more reasonable level.”), 20 (“[T]he sheer cost of such investments, as reflected in rates, will produce adverse impacts on the human environment.”).

⁴⁴ As with their First Appeal, which, as the Commission noted, was “diffuse and somewhat difficult to follow,” CLI-10-1, slip op. at 19, Petitioners again fail to call out the specific Subparts of Contention 3 that are

Commission has indicated that it appropriate to apply the standard for motions for reconsideration set forth in 10 C.F.R. § 2.323(e).⁴⁵

Under 10 C.F.R. § 2.323(e), a motion for reconsideration “must be filed within ten (10) days of the action for which reconsideration is requested.” Thus, Petitioners’ request for reconsideration of CLI-10-1 is clearly untimely, having been filed well after the ten-day period permitted for seeking reconsideration.⁴⁶ Petitioners make no attempt to address this fatal shortcoming, which alone is a sufficient basis to deny this implicit request to revisit the Commission’s earlier decision.⁴⁷

Furthermore, under Section 2.323(e), a motion for reconsideration “may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.” Petitioners wholly fail to address the significant substantive obligation imposed by Section 2.323(e), that is, to seek leave of the Commission to file a motion for reconsideration, based upon a showing of “compelling circumstances.”⁴⁸ Instead, Petitioners simply repeat arguments that were made previously rather than attempting to identify any error that renders CLI-10-1 invalid.

addressed in their appeal. This failure to delineate which particular Subparts of Contention 3 and which specific aspects of LBP-10-6 are the subject of this instant appeal, ignores Petitioners’ “responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.” *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med.*, CLI-94-6, 39 NRC at 297).

⁴⁵ *Shearon Harris*, CLI-10-9, 71 NRC ___, slip op. at 8 (“NC WARN styled its challenges to CLI-08-15 and CLI-09-8 as appeals. However, our rules do not permit such ‘appeals.’ In substance, NC WARN’s appeals of CLI-08-15 and CLI-09-8 are motions for reconsideration, which are appropriately considered under 10 C.F.R. § 2.323(e).”).

⁴⁶ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 409 (2005) (“Lateness alone is sufficient to reject [an untimely] reconsideration request.”) (citation omitted).

⁴⁷ *Id.*; *see also Shearon Harris*, CLI-10-9, slip op. at 9 n.36.

⁴⁸ 10 C.F.R. § 2.323(e).

For example, Petitioners reiterate earlier arguments that the rejection of their need for power, renewable energy alternatives, and modular alternatives arguments conflicts with the Commission’s denial of a Nuclear Energy Institute (“NEI”) petition to eliminate consideration of need for power and energy alternatives from the NRC’s National Environmental Policy Act (“NEPA”) review for new plants.⁴⁹ The Commission rejected this argument in CLI-10-1, clearly stating that it did “not find that the Board’s ruling runs counter to our denial of NEI’s rulemaking petition.”⁵⁰ Furthermore, as the Commission emphasized, Petitioners’ need for power, renewable energy alternatives, and modular alternatives arguments were properly rejected by the Board because Petitioners failed to provide adequate supporting data or analysis challenging the COL application with the specificity necessary to demonstrate the existence of a genuine dispute.⁵¹

Petitioners merely replay their previously-rejected arguments and make no attempt to identify any errors or deficiencies in the Commission’s earlier decision demonstrating that this ruling failed to consider or understand some governing precedent that should have controlling effect or some key factual information.⁵² Accordingly, in the absence of any material error of law or fact, there are no compelling circumstances that warrant reconsideration of the Commission’s earlier decision in CLI-10-1.

⁴⁹ Appeal at 10, 15.

⁵⁰ CLI-10-1, slip op. at 21-23.

⁵¹ *Id.* at 22-23, 27-29.

⁵² See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-38, 54 NRC 490, 493 (2001) (citation omitted) (noting that, in seeking reconsideration, a movant must identify errors or deficiencies in the Board’s determination demonstrating that the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information).

B. Petitioners Improperly Attempt to Introduce New Supporting Evidence

On appeal, Petitioners also complain that the Board rejected the remanded portions of Contention 3 “based on the stale record” and “without so much as a conference call or opportunity for supplemental pleading or argument.”⁵³ Apparently in an effort to cure the defects in Contention 3 as originally pled, Petitioners then attempt to supplement original Contention 3 by including several new references.⁵⁴

As an initial matter, NRC’s hearing rules do not provide Petitioners with a rolling and limitless opportunity to augment the factual bases for already-proffered contentions:

*Allowing contentions to be . . . 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. . . . Under our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.*⁵⁵

In other words, Petitioners have an “ironclad obligation” to find “any information that could serve as a foundation for a contention”⁵⁶ and to raise their claims “at the earliest possible moment.”⁵⁷ Here, despite the fact that these new references have been available to the Petitioners for months, Petitioners sat idly until the Board ruled on the remanded portions of

⁵³ Appeal at 1.

⁵⁴ See Appeal at 20-24. Because Petitioners do not specifically relate these new references to particular Subparts of Contention 3, it is not immediately apparent whether the material bears on Subparts B, F, and G of Contention 3. Again, this inadequacy provides sufficient reason to deny the Appeal given Petitioners duty was to “identify[] the errors in the decision below and ensur[e] that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellants’ claims.” *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med.*, CLI-94-6, 39 NRC at 297).

⁵⁵ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotation marks and citations omitted) (emphasis added).

⁵⁶ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 24-25 (2001) (citations omitted).

⁵⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 429 (2003).

Contention 3. Such inaction on the part of Petitioners—not to mention failure to address the requirements of 10 C.F.R. § 2.309(c) and (f)(2)—cannot support admission of Contention 3 and certainly identifies no error of law or abuse of discretion by the Board.⁵⁸ Accordingly, Petitioners’ assertions regarding the supposedly “stale” record provide no basis for questioning the Board’s decision.

Furthermore, it is well established that a petitioner may not make new arguments or introduce new evidence supporting a contention for the first time on appeal.⁵⁹ Since these new references were not included in original Contention 3, these supporting documents were never properly before the Board. Therefore, Petitioners’ belated attempt to bolster the support for Contention 3 does not identify any error of law or abuse of discretion in the Board’s ruling in LBP-10-6 and should not be considered by the Commission on appeal.⁶⁰

⁵⁸ Significantly, the Commission Order remanding portions of Contention never questioned the adequacy of the record for the purposes of determining compliance with 10 C.F.R. § 2.309(f)(1). Thus, there was no need for the Board, on remand, to reach out and ask the participants for supplemental pleadings or some other form of further briefing. Nor was there any error of law or abuse of discretion in the Board not holding an oral argument or prehearing conference. The Commission has made clear the absence of such an opportunity cannot be said to harm a petitioner because “[o]ral argument on contention admissibility is not a ‘right’” and the regulations make clear “that a petitioner must explain and support its contention in the petition to intervene.” *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-08-7, 67 NRC 187, 191 (2008).

⁵⁹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004); *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996).

⁶⁰ The Board’s responsibility was to rule on the remanded portions of Contention 3 and determine whether the contention as proposed in the Petition was admissible, not to “take notice of factual information found on the internet” that might support Petitioners’ allegations. Appeal at 21. Nevertheless, even though new information was not addressed by the Board (or by SCE&G and the NRC Staff) because it was not part of the original contention and was raised for the first time only on appeal, these additional facts would not have changed the Board’s decision. As with the information originally contained in Contention 3, “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.” LBP-10-6, slip op. at 26.

C. Petitioners Have Identified No Error of Law or Abuse of Discretion in the Board’s Ruling on the Admissibility of Subparts B, F, and G of Contention 3

The statement and background of Contention 3 is discussed in CLI-10-1 and is not repeated here.⁶¹ On remand, the Board properly followed the Commission’s instructions to reassess the admissibility of Subparts B, F, and G of Contention 3 based upon the criteria in 10 C.F.R. § 2.309(f)(1).⁶² In turn, the Board evaluated these portions of Contention 3 seriously and in considerable detail in its 38-page decision. Ultimately, the Board concluded that the Petitioners failed to satisfy the Commission’s requirements for an admissible contention. On appeal, Petitioners seek, without justification, to have the Commission substitute its judgment for that of the Board without identifying any error of law or abuse of discretion in LBP-10-6. Therefore, as discussed below, the Commission should deny the Appeal and affirm the Board’s decision rejecting Subparts B, F, and G of Contention 3.

1. The Board Applied the Correct Legal Standards Set Forth in 10 C.F.R. § 2.309(f)(1)

The Board applied the correct legal standard and adequately articulated its reasoning in ruling that the remanded portions of Contention 3 are inadmissible. On appeal, Petitioners claim that the Board “misapprehend[ed]” the Commission’s contention admissibility requirements by requiring “a dispositive standard of proof for a contention or its bases, rather than the appropriate pleading and basis standard appropriate at this stage of the proceeding.”⁶³

At the outset, Petitioners continue to misinterpret the Commission’s standards governing contention admissibility set forth in 10 C.F.R. § 2.309(f)(1)(i) through (vi) by relying on the

⁶¹ See CLI-10-1, slip op. at 17-19.

⁶² Moreover, without explanation or regard for the narrow issue remanded, Petitioners impermissibly attempt to broaden their Appeal to encompass Subpart E of Contention 3, an issue rejected by the Board in LBP-09-2 and affirmed by the Commission in CLI-10-1. See, e.g., Appeal at 1 (second page so numbered) & 8.

⁶³ Appeal at 7.

Appeal Board's outdated decision in *Peach Bottom* and incorrectly summarizing the pleading and basis requirements in 10 C.F.R. § 2.309(f)(1) as follows:

(1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.⁶⁴

Despite the explicit arguments repeatedly presented by SCE&G, highlighting the very *fundamental* changes in the threshold for the admissibility of contentions that have occurred since the *Peach Bottom* era,⁶⁵ Petitioners persist in their failure to acknowledge and confront the *current* state of the law. The Commission's criteria regarding contentions, starting with the 1989 amendment to the contention standards, "overrules, or at least supersedes, *Peach Bottom* by raising the threshold requirements."⁶⁶ Under the current regulations, as amended in 2004, a petitioner must satisfy the other five admissibility criteria in addition to satisfying the basis requirement in 10 C.F.R. § 2.309(f)(1)(ii). Thus, Petitioners' argument about the basis requirement flies in the face of the fact that the contention admissibility rules are "*strict by design*" and were further "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation."⁶⁷

In LBP-10-6, the Board properly relied on the applicable, current contention admissibility requirements in rejecting the remanded portions of Contention 3. The Board clearly explained

⁶⁴ Appeal at 6-7 (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-19, 33 NRC 397, 400 (1991)).

⁶⁵ See SCE&G Opposition to First Appeal at 5-7; SCE&G Answer at 10-11.

⁶⁶ *Palo Verde*, LBP-91-19, 33 NRC at 400.

⁶⁷ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (emphasis added) (citation omitted).

that “[t]hese 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.’”⁶⁸ Moreover, Petitioners’ conclusory statements on appeal⁶⁹ are insufficient to satisfy Petitioners’ responsibility to “clearly identify[] the errors in the decision below and ensur[e] that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”⁷⁰ In short, there is absolutely nothing in the Petitioners’ discussion of the legal standards governing contention admissibility which suggests that the Board committed any error of law or abuse of discretion. To the contrary, Petitioners’ reference to outdated contention admissibility standards fundamentally undercuts their arguments on the Board’s contention admissibility decision, as further discussed below.

2. The Board Properly Found Subpart B of Contention 3 Inadmissible on Remand

Subpart B of Contention 3 alleged that, “[w]ith respect to Chapter 9 of the 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.”⁷¹ As support for this claim, Petitioners set forth twenty-three assertions that simply parrot paragraphs 34 through 56 of the Brockway Declaration.⁷²

⁶⁸ LBP-10-6, slip op. at 7 (quoting CLI-10-1, slip op. at 9 (citations omitted)).

⁶⁹ See, e.g., Appeal at 7 (“The contentions submitted by Sierra and FOE amply meet these requirements; raise significant environmental issues supported by substantial information and expert opinion; are material to the NRC’s licensing decision and should be admitted for adjudication.”).

⁷⁰ *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med. Sys.* CLI-94-6, 39 NRC at 297).

⁷¹ Petition at 34 (emphasis added).

⁷² *Id.* at 34-38; Brockway Declaration ¶¶ 34-56.

On remand, the Board evaluated each of these assertions against the Commission’s admissibility criteria and found Subpart B of Contention 3 inadmissible.⁷³ The Board properly found Subpart B to be deficient to the extent Petitioners might have intended to claim that SCE&G completely ignored DSM because the ER already includes a 250-MW contribution from DSM.⁷⁴ The Board then found Petitioners’ imprecise statement that SCE&G “almost completely ignores” DSM could mean one of two things: (1) SCE&G should have attributed a higher value to DSM than the 250 MW; or (2) SCE&G should have considered DSM (or additional DSM) in its consideration of alternatives to VCSNS Units 2 and 3.⁷⁵ Viewed either way, however, the Board found that Petitioners’ “general assertions of insufficient consideration of DSM are inadequate to raise an admissible contention.”⁷⁶

With respect to the claim that SCE&G should have attributed a higher value to DSM than the 250 MW, the Board explained that essentially all of the statements in Subpart B consist 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.”⁷⁷ The Board found that:

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

⁷³ LBP-10-6, slip op. at 9-36.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 9-10.

⁷⁶ *Id.* at 10 (citing 10 C.F.R. § 2.309(f)(1)(v), (vi)).

⁷⁷ *Id.*

or SCE&G's potential for achieving additional DSM which Petitioners assert, broadly, to be lacking from the Application.⁷⁸

To the extent Petitioners suggested that SCE&G should have attributed a higher value to DSM than the 250 MW, the Board properly found that Petitioners failed to satisfy 10 C.F.R. § 2.309(f)(1)(iv)-(vi). Petitioners turn a blind eye to this aspect of the Board's ruling. Accordingly, the Petitioners identify no error of law or abuse of discretion in the Board's decision rejecting claims that SCE&G could have attributed a higher value to DSM.

Furthermore, with respect to the claim that SCE&G should have considered DSM (or additional DSM) in its alternatives analysis, the Board started with the fundamental premise that there is no obligation under NEPA to examine every possible alternative.⁷⁹ The Board also explained "that the burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention."⁸⁰ Applying these precepts, the Board properly found that Subpart B failed to raise a genuine dispute on a material issue of fact or law because Petitioners failed to offer *any* specific combination of generation alternatives that included DSM, as required by 10 C.F.R. § 2.309(f)(1)(iv) and (vi).⁸¹ Furthermore, the Board pointed out that the Petitioners failed to indicate the amount of any incremental increase in DSM that might be achieved (in addition to the 250 MW identified in the ER) or how this additional DSM would impact SCE&G's conclusions in the alternatives evaluation presented in the ER.⁸² To the extent Petitioners suggested that SCE&G should have explicitly considered DSM in its alternatives evaluation, the Board properly found that Petitioners failed to demonstrate genuine

⁷⁸ *Id.*

⁷⁹ *Id.* at 29.

⁸⁰ *Id.* at 30.

⁸¹ *Id.* at 31.

⁸² *Id.*

dispute with the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Again, Petitioners fail to identify any error of law or abuse of discretion in the Board’s decision rejecting claims that SCE&G should have considered DSM (or additional DSM) in its alternatives discussion.

On appeal, Petitioners claim that the “Board selectively rejects the Brockway opinion evidence by erecting and then attacking isolated strawman examples.”⁸³ According to Petitioners, the Brockway Declaration “provided detailed explanation of her professional reasoning to support her critique of SCE&G’s devaluation of the alternative of energy efficiency and demand side management to displace the proposed new nuclear generation.”⁸⁴

Despite Petitioners’ assertion to the contrary, the Board correctly found that the Brockway Declaration itself failed to provide adequate factual or expert opinion support and failed to demonstrate the existence of genuine material dispute. In fact, on remand, the Board evaluated each of twenty-three DSM-related assertions—both individually and collectively—against the Commission’s six contention admissibility factors in 10 C.F.R. § 2.309(f)(1) and properly found Subpart B inadmissible.⁸⁵ As the Board aptly observed, “[t]he 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’ expert, is insufficient to support admission of a contention.”⁸⁶ Petitioners largely ignore the Board’s reasons for finding this contention inadmissible. In fact, aside from extolling Ms. Brockway’s qualifications, Petitioners gloss over the pervasive inadequacy of the Brockway Declaration found by the Board, and simply quote

⁸³ Appeal at 17.

⁸⁴ *Id.*

⁸⁵ LBP-10-6, slip op. at 9-36.

⁸⁶ *Id.* at 14-15 (citations omitted).

from several portions of the Brockway Declaration without any explanation of how or why the Board's decision is erroneous.⁸⁷

Petitioners claim that the Brockway Declaration establishes that “energy usage could be reduced by ‘25% on average through cost-effective efficiency’ in the United States generally, without exception in SCE&G’s South Carolina service territory.”⁸⁸ However, the Board properly found this statement insufficient to support an admissible contention, explaining as follows:

Petitioners’ assertion . . . 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 [this statement] indicate energy usage could be reduced, or how, if at all, such methods might be applied by SCE&G. This generalized reference . . . thus fails to provide any of the support needed for an admissible contention.⁸⁹

Similarly, Petitioners quote the Brockway Declaration assertion that “that 5% of the state’s energy needs could be met with energy efficiency resources by 2020.”⁹⁰ Again, the Board found that Petitioners failed to relate this report on state-wide energy efficiency potential to any finding in the COL application, explaining as follows:

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. [This statement] therefore fails to support an admissible contention disputing the contents of the Application.⁹¹

⁸⁷ Appeal at 12 (quoting Brockway Declaration ¶¶ 34-36), 13 (quoting Brockway Declaration ¶¶ 46, 49), 16 (quoting Brockway Declaration ¶ 56), 17 (quoting Brockway Declaration ¶ 42).

⁸⁸ Appeal at 17 (quoting Brockway Declaration ¶ 42).

⁸⁹ LBP-10-6, slip op. at 13.

⁹⁰ Appeal at 13 (quoting Brockway Declaration ¶ 46).

⁹¹ LBP-10-6, slip op. at 16.

The Commission has made clear that “an expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.”⁹² Regardless of Ms. Brockway’s credentials, the Declaration is flawed for this very reason, as it simply does not “connect the dots” between these general references regarding potentially-available DSM opportunities and any additional DSM program that SCE&G might implement.⁹³ Nor does the Brockway Declaration attempt to demonstrate that any DSM program that SCE&G might implement is related to any “reduction [in demand that] could materially affect the NEPA alternatives analysis.”⁹⁴ As the Commission stated in upholding the Board’s rejection of other aspects of Contention 3 that relied on similarly vague assertions in the Brockway Declaration, “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).”⁹⁵ Accordingly, Petitioners offer nothing in their Appeal to suggest any error or abuse of discretion in the Board’s Order.

3. The Board Properly Found Subparts F and G of Contention 3 Inadmissible on Remand

Basis F of Contention 3 alleged that “the Applicant’s cost estimate for construction and operation” of the proposed VCSNS units “fails to take into account recent rapid increases in the costs of inputs for construction.”⁹⁶ Basis G of Contention 3 similarly alleged that SCE&G’s

⁹² *USEC*, CLI-06-10, 63 NRC at 472 (quoting *Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 181, *aff’d*, CLI-98-13, 48 NRC 26 (1998)).

⁹³ LBP-10-6, slip op. at 10.

⁹⁴ *Id.* at 23.

⁹⁵ CLI-10-1, slip op. at 28.

⁹⁶ Petition at 26, 42.

“cost estimate for construction and operation is based on an unrealistic schedule,” and improperly “assumes a settled and approved design for its proposed AP1000.”⁹⁷

In CLI-10-1, the Commission reaffirmed the Appeal Board’s *Midland* decision, which clearly establishes:

[N]either NEPA nor any other statute gives us the authority to reject an applicant's proposal solely because an alternative might prove less costly financially. Monetary considerations come into play in only the opposite fashion—i.e., if an alternative to the applicant’s proposal is environmentally preferable, then we must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them.⁹⁸

The Commission indicated, however, that it was “premature” to apply this precedent because the Commission was remanding Subpart B of Contention 3, which if admitted, might involve the identification of an allegedly environmentally preferable alterative and thus, might make the *Midland* rule inapplicable.⁹⁹

As discussed in detail above, on remand, the Board properly found that Subpart B of Contention 3 was inadmissible. Thus, the Board also then correctly rejected Petitioners’ arguments regarding the cost of the proposed VCSNS units.¹⁰⁰ On appeal, Petitioners simply rehash the unsupported arguments raised and rejected by the Board in LBP-09-2. Petitioners restate their claim that SCE&G underestimates the cost for the proposed VCSNS units¹⁰¹ and, without acknowledging, let alone attempting to distinguish the *Midland* precedent or the Commission’s instructions in CLI-10-1, assert that the “shear cost” of the proposed new AP1000

⁹⁷ *Id.* at 42, 47.

⁹⁸ CLI-10-1, slip op. at 31 (quoting *Midland*, ALAB-458, 7 NRC at 163 n.25).

⁹⁹ *Id.*

¹⁰⁰ LBP-10-6, slip op. at 36.

¹⁰¹ Appeal at 19.

units “will produce adverse impacts on the human environment” that should be considered in this COL proceeding.¹⁰²

Despite these vague assertions, the Board correctly rejected Petitioners’ argument regarding the cost estimates for the proposed VCSNS units. As the Board succinctly explained:

[B]ecause 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. 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. 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.¹⁰³

In reaching this conclusion, the Board appropriately followed the Commission direction in CLI-10-1 regarding the application of the longstanding *Midland* precedent. In *Midland*, the Appeal Board held:

[NEPA] requires us to consider whether there are *environmentally* preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. *But if*

¹⁰² *Id.* at 20.

¹⁰³ LBP-10-6, slip op. at 36 (citations omitted).

*there are no preferable environmental alternatives, such cost-benefit balancing does not take place.*¹⁰⁴

Thus, “NEPA requires [the NRC] to look for environmentally preferable alternatives, not cheaper ones.”¹⁰⁵ Accordingly, whether the cost of a proposed project is reasonable is left “to the business judgment of the utility companies and to the wisdom of the State regulatory agencies responsible for scrutinizing the purely economic aspects of proposals to build new generating facilities.”¹⁰⁶

Rather than *demonstrating* the existence of a reasonable energy alternative that is environmentally preferable, Petitioners continue to *speculate* that their still-undefined “modular” approach in combination with renewables and DSM “*may* emerge as an environmentally preferable alternative.”¹⁰⁷ But “neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention.”¹⁰⁸ Without an environmentally preferable alternative identified in the COL application or appropriately specified and supported by the Petitioners, a precise cost estimate is simply not relevant. Thus, the Board properly rejected Subparts F and G of Contention 3, and the Petitioners establish no error in that judgment.

¹⁰⁴ *Midland*, ALAB-458, 7 NRC at 162 (emphasis added).

¹⁰⁵ *Id.* at 168.

¹⁰⁶ *Id.* at 162-63.

¹⁰⁷ Appeal at 20 (emphasis added).

¹⁰⁸ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)).

V. CONCLUSION

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

Respectfully submitted,

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Dated in Washington, DC
this 5th day of April 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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|---|---|---------------------------------------|
| In the Matter of |) | |
| |) | |
| SOUTH CAROLINA ELECTRIC & GAS |) | Docket Nos. 52-027-COL and 52-028-COL |
| COMPANY AND SOUTH CAROLINA |) | |
| PUBLIC SERVICE AUTHORITY (ALSO |) | April 5, 2010 |
| REFERRED TO AS SANTEE COOPER) |) | |
| |) | |
| (Virgil C. Summer Nuclear Station Units 2 |) | |
| and 3) |) | |
| |) | |

CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2010, a copy of “South Carolina Electric & Gas Company’s Brief in Opposition to Sierra Club and Friends of the Earth Appeal from LBP-10-6” was served electronically with the Electronic Information Exchange on the following recipients:

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