

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY) Docket Nos. 52-027 and 52-028
)
(Virgil C. Summer Nuclear Station,)
Units 2 and 3))

NRC STAFF BRIEF IN OPPOSITION TO
APPEAL OF LBP-10-6 BY SIERRA CLUB AND FRIENDS OF THE EARTH

Russell E. Chazell
Counsel for NRC Staff

April 5, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 1

STATEMENT OF THE ISSUES 2

LEGAL STANDARDS 2

 I. Legal Standards for Review of a Board Order Denying a Petition to Intervene 2

 II. Legal Standards for the Issue of Remand 3

 III. Legal Standards for Intervention Petitions..... 4

 A. Legal Requirements for Contention Admissibility 4

DISCUSSION..... 5

Summary of the Board’s Decision in LBP-10-6..... 5

 I. The Commission Remand 5

 II. The Board Properly Found That No Admissible Contentions Were Submitted 6

 A. The Board Properly Rejected Contentions 3B on Need for Power, Cost of
 Action, and Alternatives. 6

 B. The Board Properly Rejected Contentions 3F and 3G on Need for Power,
 Cost of Action, and Alternatives..... 8

 III. Petitioners’ Arguments on Appeal 9

 A. Petitioners’ Arguments Outside the Scope of Remand..... 9

 B. Petitioners’ Introduction of New Facts and Arguments Not Present in the
 Petition to Intervene 12

 C. Petitioners’ Failure to Show Error in the Board’s Decision 13

CONCLUSION 15

TABLE OF AUTHORITIES

Federal Cases

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) 11

Commission Decisions

Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006) 4

Amergen Energy Co., LLC, (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124 (2007) 12

AmerGen Energy Company, LLC, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006) 3

Ariz. Pub. Serv. Co. et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991) 4

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004) 3

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001) 4

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005) 6

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005) 5, 11

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318 (1999) 4

South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC __ (slip op.) (January 7, 2010)..... 2

South Carolina Electric and Gas Co. and South Carolina Public Service Authority (Also Referred to as Santee Cooper), (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC __ (slip op.)..... passim

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192 (1993) 14

Atomic Licensing Appeal Board Decisions

Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122 (1979)..... 3

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978)..... 9

Houston Lighting and Power Co., (Allens Creek Nuclear Generating Station, Unit 1),
ALAB-582, 11 NRC 239 (1980)..... 12

Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2),
ALAB-551, 9 NRC 704 (1979)..... 3

Atomic Safety and Licensing Board Decisions

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant), LBP-08-21,
68 NRC 554 (2008) 9

*South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also
Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3),
LBP-09-2, 69 NRC 87 (2009) 2, 5, 8, 9

*South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also
Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3),
LBP-10-6, 71 NRC __ (Mar. 17, 2010) (slip op.) passim

Regulations

10 C.F.R. § 2.309..... 1

10 C.F.R. § 2.311..... 1

Federal Register

69 Fed. Reg. 2,182 (Jan 14, 2004) 4

73 Fed. Reg. 45,792 (Aug. 6, 2008) 2

73 Fed. Reg. 60,362 (Oct. 10, 2008) 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY)
) Docket Nos. 52-027 and 52-028
(Virgil C. Summer Nuclear Station,)
Units 2 and 3)

NRC STAFF BRIEF IN OPPOSITION TO
APPEAL OF LBP-10-06 BY SIERRA CLUB AND FRIENDS OF THE EARTH

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, the staff of the Nuclear Regulatory Commission (Staff) hereby files a brief in opposition to the Notice of Appeal and Appeal Brief, filed on March 26, 2010, by Sierra Club and Friends of the Earth (Petitioners), regarding the Atomic Safety and Licensing Board's (Board's) decision in *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-10-6, 71 NRC __ (Mar. 17, 2010) (slip op.). In this decision, the Board properly concluded that the Petitioners' Contention 3B failed to comply with the contention admissibility requirements of 10 C.F.R. § 2.309. Since Contention 3B was ruled inadmissible, the Board restated its earlier decision regarding Contentions 3F and 3G and ruled them inadmissible as well. The Board committed no error of law or abuse of discretion in ruling Contentions 3B, 3F, and 3G were inadmissible. The Board's ruling, LBP-10-6, should be upheld.

STATEMENT OF THE CASE

By letter dated March 27, 2008, South Carolina Electric and Gas Company (SCE&G or Applicant), acting for itself and as agent for the South Carolina Public Service Authority (also referred to as "Santee Cooper") submitted a COL application (Summer COL application or

COLA) for two AP1000 advanced passive pressurized water reactors (PWRs) to be located in Fairfield County, South Carolina. The *Federal Register* docketing notice was published on August 6, 2008 (73 Fed. Reg. 45,792), and the *Federal Register* notice of hearing was published on October 10, 2008 (73 Fed. Reg. 60,362).

The Petitioners filed their intervention petition on December 9, 2008. On February 18, 2009, the Atomic Safety and Licensing Board issued *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87 (2009), which held, *inter alia*, that no admissible contentions were presented and denied the petition in its entirety. Petitioners appealed the Board's ruling to the Commission on February 27, 2009 and both the Staff and the Applicant filed briefs in opposition on March 9, 2009. The Commission reversed and remanded for reconsideration the Board's determination of the admissibility of Petitioners' Contentions 3B, 3F, and 3G. *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC __ (slip op.) (January 7, 2010). On March 17, 2010, The Atomic Safety and Licensing Board issued LBP-10-6, denying the petition, which is now being appealed by Petitioners.

STATEMENT OF THE ISSUES

The issue presented is whether the Board wrongly denied the Petition. The Board's decision should be reversed only if it committed an error of law or abuse of discretion that caused it to wrongly reject the proffered contentions remanded to it by the Commission's CLI-10-01 decision, namely Petitioners' Contentions 3B. Then, based on the Board's decision regarding 3B, whether the Board wrongly rejected Petitioners' Contentions 3F and 3G.

LEGAL STANDARDS

I. Legal Standards for Review of a Board Order Denying a Petition to Intervene

The legal standards applicable to the Commission's review of the Board's rulings are set forth in Commission adjudicatory decisions. "We give 'substantial deference' to our boards'

determinations on threshold issues, such as standing and contention admissibility. We regularly affirm Board decisions on admissibility of contentions where the appellant ‘points to no error of law or abuse of discretion.’” *AmerGen Energy Company, LLC*, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006)).

A petitioner appealing a Board’s denial of intervention “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.” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)). The Commission applied this principle in *Millstone* to reject on appeal “general arguments” that failed to “come to grips with the Board’s reasons for rejecting” the contention. *Millstone*, CLI-04-36, 60 NRC at 639.

II. Legal Standards for the Issue of Remand

On remand, the Board and the parties are limited to focusing on the issues remanded to the Board by the Commission. “The Licensing Board’s present jurisdiction over the proceeding is very limited. All that is before the Board, and all that it may consider, is what was remanded to it.” *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979). One Board stated that “jurisdiction may be resurrected by a remand order of either the Commission or a court, issued during the course of its own review of our decision. What might be considered by us on the remand would, however, be shaped by that order; i.e., if (as customarily would be the case) the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of its scope to embrace discrete matters.” *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979). Thus, all issues not included for consideration in

the Commission's remand order are foreclosed as final and outside the scope of the Petitioners' appeal. Here, the Commission instructed the Board to address Contentions 3B, 3F, and 3G, and no others. In addition, the Commission stated 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." *South Carolina Electric and Gas Co. and South Carolina Public Service Authority (Also Referred to as Santee Cooper)*, (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC ___ (slip op. at 32, n.118). Alternatively, if Contention 3B were admissible, then the Board would need to reconsider its decision regarding Contentions 3F and 3G.

III. Legal Standards for Intervention Petitions

A. Legal Requirements for Contention Admissibility

The legal requirements governing the admissibility of contentions are well established and are currently set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). No contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met. Final Rule, "Changes to the Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan 14, 2004); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Ariz. Pub. Serv. Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

DISCUSSION

Summary of the Board's Decision in LBP-10-6

I. The Commission Remand

The Board, in LBP-09-2, characterized Petitioners' Contention 3B "COLA challenge as directly analogous to the situation in Clinton, and see the Commission's ruling therein as affirming the conclusion there, and mandating our conclusion here, that [demand side management] DSM need not be considered as an alternative to the generation of base-load power." *Sumner*, LBP-09-2, 69 NRC at 109, n. 86. In *Clinton*, the Board held that "Exelon and the NRC staff were not obliged to examine general efficiency or conservation proposals that would do nothing to satisfy this particular project's goals," which was to generate base load power. *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005), *aff'd*, *Env'tl. Law & Policy Ctr v. NRC*, 470 F.3d 676 (7th Cir. 2006). For that reason, the Board, in LBP-09-2, held that Petitioners' Contention 3B was inadmissible "[b]ecause a DSM program is not a substitute for the addition of base-load power, which is the accepted project purpose, [therefore] this challenge raises matters outside the scope of this proceeding, thus failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii), and raises matters that are not material to the determination the NRC must make, this failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv)." *Sumner*, LBP-09-2, 69 NRC at 109.

Addressing Petitioners' appeal from LBP-09-2, the Commission stated that "the Board paints the issue with too broad a brush. In *Clinton*, the applicant was a merchant power producer proposing to sell power on the open market, nationwide. Given that goal, Exelon had neither the mission nor the ability to implement 'energy efficiency' alternatives. In such a circumstance, energy efficiency is not a reasonable alternative under NEPA." *Sumner*, CLI-10-01, 71 NRC __ (slip op. at 26). The Commission reversed and remanded for reconsideration Petitioners' Contention 3B because the Applicant is "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.” *Summer*, CLI-10-01, 71 NRC ___ (slip op. at 26). For this reason, the Commission held that the Board erred by applying the *Clinton* standard to this petition. *Id.*

On remand, the Board thoroughly reviewed all aspects of Contention 3B and then applied its 3B ruling to Contentions 3F and 3G. The Board engaged in what it titled, a “Specific Analysis of Supporting and Clarifying Statements” found in both Petitioners’ pleadings and the supporting Declaration of Petitioners’ expert, Nancy Brockway. *Summer*, LBP-10-06, 71 NRC ___ (slip op. at 11). In the analysis, the Board identified twenty-three specific assertions made in the Petition and Ms. Brockway’s declaration and “examine[d] each specific assertion, to determine whether it provides a basis or support for the contention.” *Id.* The Board labeled the assertions as D1 through D23 and grouped them into three substantive areas. *Summer*, LBP-10-06, 71 NRC ___ (slip op. at 12). Once the assertions were grouped, the Board then examined them to determine if individually or in the aggregate they provide the requisite support for the admission of Contention 3B. *Id.* After completing this careful review, the Board ruled that Contention 3B was inadmissible for failure to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

II. The Board Properly Found That No Admissible Contentions Were Submitted

A. The Board’s Decision Rejecting Contention 3B on Need for Power, Cost of Action, and Alternatives.

In order to be admissible, a contention must comply with every requirement listed in 10 C.F.R. § 2.309(f)(1). Failure to meet any one of the requirements is grounds for dismissal. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567-68 (2005). The Board did not commit legal error or abuse of discretion in denying Part B of Petitioners’ third contention, titled “Need for Power, Cost of Action, and Alternatives,” because the Petitioners failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi). Contention 3B is as follows:

(3B) With 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.

Petition at 25.

In rejecting Contention 3B, the Board analyzed all twenty-three assertions proffered by the Petitioners in support of this contention. Twenty-two of the twenty-three assertions challenged the Applicant’s project purpose: namely, the need for power. The challenge to the Applicant’s project purposes, as the Board noted, had already been considered and rejected by the Board. Specifically, the Board stated that “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.” *Summer*, LBP-10-06, 71 NRC __ (slip op. at 27-28). The rejection of this challenge was upheld by the Commission. *Id.* at 28.

Additionally, all of the assertions related to demand-side management as a mechanism to offset the need for power that the Applicants project in the ER. *Id.*, at 11. The Board considered fifteen of the twenty-two statements as providing supporting information to assess DSM level considered by the Applicant. *Id.* at 12. The other assertions addressed DSM generically. *Id.* at 12-28. The Board found that these assertions were speculative, inadequately supported, failed to point to specific flaws or shortcomings in the Applicant’s ER, or failed to provide a link to the Applicant’s existing DSM programs. *Id.* In the end, the Board stated that assertions D1-D22 suggested that the Applicant should have considered a larger contribution of DSM in its planning but that the maximum amount of DSM suggested by the Petitioners “is small when compared to the overall capacity of the proposed project.” *Id.* at 27. This conclusion did not support an admissible contention.

With respect to the remaining assertion, assertion D23, after a careful review, the Board determined 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.” (Emphasis added). *Summer*, LBP-10-06, 71 NRC ___ (slip op. at 34). Further, the Board held that “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).” *Summer*, LBP-10-06, 71 NRC ___ (slip op. at 34). As discussed below, the Petitioners fail to show in their appeal that the Board’s decision constitutes an error of law or an abuse of discretion.

B. The Board’s Decision Rejecting Contentions 3F and 3G on Need for Power, Cost of Action, and Alternatives.

The Board did not commit legal error or abuse of discretion in dismissing Parts F and G of Petitioners’ third contention.¹

The Board originally rejected Contentions 3F and 3G because Petitioners failed to demonstrate the materiality of the economic costs of construction to the NRC’s NEPA analysis. *Summer*, LBP-09-2, 69 NRC at 112. In doing so, the Board relied on the reasoning provided in *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant), LBP-08-21, 68 NRC

¹ Contentions 3F and 3G provided that:

(3F) With respect to Chapter 10 of the ER, “Proposed Action Consequences,” the Applicant’s cost estimate for construction and operation fails to take into account recent rapid increases in the cost of inputs for construction.

(3G) With respect to Chapter 10 of the ER, “Proposed Action Consequences,” the Applicant’s cost estimate for construction and operation is based on an unrealistic schedule, and assumes a settled and approved design for its proposed AP1000, which has not yet been established and for which there is no firm date for Commission determination.

554, 576 (2008), which primarily relied upon *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978). Agreeing with the cited authority, the Board concluded that monetary construction costs are only relevant to the NRC's NEPA analysis if an environmentally preferable alternative is identified. See *Sumner*, LBP-09-2, 69 NRC at 113, n.102. Because neither the ER nor the Petitioners identified an environmentally preferable alternative, the Board found that the materiality of monetary construction costs had not been demonstrated. *Id.* at 112.

In ruling on the Petitioners' first appeal, the Commission ruled that the Board was only required to reconsider Contentions 3F and 3G if Contention 3B was found to be admissible. *Sumner*, CLI-10-01, 71 NRC __ (slip op. at 31-32). If Contention 3B was found to be inadmissible, then the Board's "stated rationale for Subparts 3F and 3G would form a valid basis for excluding these claims." *Id.* at n.118. Consistent with the Commission's remand order, after determining that Contention 3B was inadmissible, the Board concluded that Contentions 3F and 3G were inadmissible because "there is no potentially environmentally preferable alternative at issue in this proceeding." *Sumner*, LBP-10-06, 71 NRC __ (slip op. at 36).

III. Petitioners' Arguments on Appeal

On appeal, Petitioners raise a number of issues, some of which are outside the scope of remand because they address contentions whose rejection was affirmed by the Commission, and some of which present new facts and arguments not present in the Petition to Intervene. Finally, Petitioners fail to point to any specific error or abuse of discretion in the Board's decision; but simply make broad, vague and generalized references to it. The Staff will answer the issues presented in the Petitioners' appeal brief below.

A. Petitioners' Arguments Outside the Scope of Remand

The Commission remanded for further consideration Contention 3B and directed that, based on the Board's admissibility determination of 3B, Contentions 3F and 3G might reconsidered as well. All of the other contentions previously proffered by Petitioners were ruled

inadmissible by the Board in LBP-09-2 and that ruling was affirmed by the Commission in CLI-10-01. Petitioners appear to raise issues associated with contentions that were not within the scope of remand. Any arguments made regarding contentions other than 3B, 3F, and 3G are outside the scope of the Commission's remand order and should be disregarded.

For example, Petitioners discuss contention 3E. Appeal Brief at 8. In its decision, the Commission reversed and remanded Subparts B, F, and G, of Contention 3 and stated that: “[w]e have identified no error in the Board’s decision to reject the balance of Contention 3, and we decline to disturb its ruling further. *Sumner*, CLI-10-01, 71 NRC __ (slip op. at 32). Contention 3E pertains to the alleged underestimation of Applicant’s “impact of its proposed construction and operation on vulnerable customers via rate increases.” *Id.* at 5. Specifically, Petitioners include 3E in their discussion of contentions 3B, 3F, and 3G, all of which include considerations of cost. *Id.*, at 8. Later, Petitioners discuss Ms. Brockway’s assertion that rate increases would “produce hardship for many, ‘especially those of lower incomes and marginal profitability.’” *Id.* at 19. Since the Commission did not remand contention 3E, any argument by the Petitioners regarding rate increases is outside the scope of remand and should be disregarded.

In another example, Petitioners raise Contentions 3C and 3D by arguing that the Board errs by insisting on identifying an environmentally preferable alternative is necessary before a cost-benefit analysis must be done by the Applicant. Petitioners state that “[t]here is no dispute that building any 1,117 mW central station generation units will have environmental impacts that must be considered. In addition to impacts on the natural environment, and as discussed above, the shear (sic) cost of such investments, as reflected in rates (another 3E argument) will produce adverse impacts on the human environment.” Appeal Brief at 20. Petitioners then continue to discuss solar, wind, and modular alternatives. However, these assertions go to the issues raised by Contentions 3C, 3D, and 3E. As noted by the Commission, “Section 9.2.2 of the ER discusses possible alternatives for new generating capacity, including wind power, solar

technologies, and power generation from combustion of biomass.” *Summer*, CLI-10-01, 71 NRC ___ (slip op. at 29). The Commission further stated “that the Board did not err in excluding Subparts 3C and 3D of the contention regarding renewable energy alternatives and the use of a ‘modular’ approach.” *Id.*

Additionally, Petitioners argue that “by uncritically accepting the applicant’s narrow definition of the project as providing ‘2000 megawatts of base-load electrical generation’ the Board eliminates any fair consideration of the need for that capacity” Appeal Brief at 9. This is a “need for power” argument regarding Contention 3A as well as alternatives arguments under Contentions 3C and 3D. Petitioners appear to believe that the Applicant chose a baseload power source for economic reasons and that such purposes need not be credited in NEPA environmental reviews. See Appeal Brief at 16. However, such purposes may be appropriate. For example, the business purposes of an applicant, which are motivated by economic considerations, were credited in *Clinton ESP*. *Clinton*, CLI-05-29, 62 NRC 801. Additionally, “a reviewing agency, in this case the NRC, determines whether an alternative is ‘appropriate’ by looking at the objectives (i.e., purpose and need) of a project sponsor.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Further, “when the purpose is to accomplish one thing, it makes no sense to consider alternative ways by which another thing might be accomplished.” *Id.* (citing *City of Angoon v. Hodel*, 803 F. 2d 1016, 1021 (9th Cir. 1986)). Petitioners admit that “individual alternatives might not be sufficient on their own to provide the capacity that the two proposed units would provide” Appeal Brief at 17. Petitioners’ arguments regarding alternatives analyses fail because they do not accomplish the Applicant’s stated purpose but constitute “alternative ways by which another thing might be accomplished.” The Board’s decision that this contention was inadmissible is also affirmed by the Commission. *Summer*, CLI-10-01, 71 NRC ___ (slip op. at 23). Again, the Board’s rulings regarding Contentions 3A, 3C, and 3D were affirmed and any arguments regarding them are outside the scope of remand and should be disregarded.

B. Petitioners' Introduction of New Facts and Arguments Not Present in the Petition to Intervene

The Petitioners argue that “[t]he Licensing Board summarily rejected these contentions at the pleading stage, without so much as a conference call or opportunity for supplemental pleading or argument . . . Moreover, this rejection was based on the stale record of December 2008 submissions; when the whole landscape of energy production and efficiency planning, including that of SCE&G’s South Carolina territory, is changing and has changed to favor demand reduction and new plant displacement or deferral.” Appeal Brief at 1. Petitioners argue that the Board’s decision was based on the “stale record of December 2008 submissions,” *Id.*, and proceed to introduce new facts that were not part of the Intervention Petition. Introducing new arguments on appeal is not a legitimate basis for overruling a Board’s decision. The Commission has stated that “[i]t is unfair to other litigants and to our licensing boards to consider issues and allegations raised for the first time on appeal.” *Amergen Energy Co., LLC*, (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, n. 38 (2007). *See also Houston Lighting and Power Co.*, (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980) (“[W]e would scarcely be justified in overturning the ruling on the strength of new assertions of fact which could have been, but were not, either included in the petition or otherwise presented to the Board below.”).

Petitioners, in this appeal, argue that “[t]ime marches on and developments reinforce the merits of alternatives to this costly project.” Appeal Brief at 20-21. New arguments and facts presented on appeal by Petitioners include Duke Energy’s decision to defer for three years the potential commercial operations of their new nuclear project; Moody’s Investors Service commentary on ratings pressure; comments made by the Chairman of the Federal Energy Regulatory Commission regarding the future efficacy of new nuclear or coal plants; the NRC’s recent comments regarding the AP1000 containment building; the effect of the American Recovery and Reinvestment Act of 2009 on energy programs; the South Carolina Public

Service Commission hearing regarding DSM; and SCG&E's most recent Integrated Resource plan. These additional arguments and facts presented by the Petitioners were not originally presented before the Board and do not support overturning the Board's decision here.

C. Petitioners' Failure to Show Error in the Board's Decision

Petitioners argue that the Board "misapprehend these requirements, [the contention basis requirements], generally, where it insists on a dispositive standard of proof for a contention or its bases, rather than the appropriate pleading and basis standard appropriate at this stage of the proceeding." Appeal Brief at 7. Petitioners fail to specify how the Board has misapprehended these basis requirements. They simply reiterate their argument that "[t]he costs and risks of the proposed reactors are unnecessary and wholly out of proportion to any possible benefit; and the energy services to be provided by the project can be supplied by alternative means that are cheaper and pose less environmental impact." Appeal Brief at 8. On remand, the Board listed the conditions for admission of a contention stating that those conditions are "strict by design" and that "mere notice pleading is insufficient." *Summer*, LBP-10-06, 72 NRC __ (slip op. at 3 and n. 8 and 9). The Board, "[h]aving 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." *Id.* at 36.

The Board's conclusion was correct because, by thoroughly considering all of the twenty-three assertions made by Petitioners and their expert, Ms. Brockway, the Board determined that they were all, conclusory,² speculative,³ inadequately supported,⁴ or failed to

² The Board deemed assertions D1-D3, D5, D14-D17, and D19-D21 conclusory. *Summer*, LBP-10-06, 72 NRC __ (slip op.).

³ The Board deemed assertions D8 and D10 speculative. *Summer*, LBP-10-06, 72 NRC __ (slip op.).

make a connection to the Applicant's programs.⁵ In short, none of these assertions support admissibility. The Board correctly determined that these assertions from Petitioners' expert did not support admissibility because "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." *Summer*, LBP-10-06, 72 NRC ___ (slip op. at 5) (citing *USEC, Inc.*, (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 473 (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))).

Additionally, Petitioners' Appeal, although raising previously presented arguments, such as DSM, adequacy of alternatives considerations, resource overestimation, energy efficiency recommendations, and combination of alternatives analyses, Appeal Brief at 11-13, fails to address the Board's detailed reasons for rejecting those arguments. Petitioners' simply restate their previous arguments without any specific allegation of Board error. "A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'" *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993) (quoting *Georgia Power Co.*, (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 67 (1992)).

None of the assertions made by Petitioners regarding Contentions 3B, 3F, and 3G is sufficient to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi). The Board committed no error in its LBP-10-06 decision.

⁴ The Board deemed assertions D2-D3, D5-D8, D10-11, and D11-23 inadequately supported. *Summer*, LBP-10-06, 72 NRC ___ (slip op.).

⁵ The Board stated that assertions D2, D4-D5, D9-D13, D16-D17, and D19-D21 failed to make a connection to Applicant's programs. *Summer*, LBP-10-06, 72 NRC ___ (slip op.).

CONCLUSION

Petitioners do not identify any legal errors or abuse of discretion in the Board's contention admissibility determinations. For these reasons, Petitioners' appeal should be denied.

Respectfully submitted,

/Signed (electronically) by/

Russell E. Chazell
Counsel for NRC staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-5003
Russell.Chazell@nrc.gov

Dated at Rockville, Maryland
this 5th day of April, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY) Docket Nos. 52-027 and 52-028
)
(Virgil C. Summer Nuclear Station)
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF BRIEF IN OPPOSITION TO APPEAL OF LBP-10-06 BY SIERRA CLUB AND FRIENDS OF THE EARTH have been served upon the following persons by Electronic Information Exchange this 5th day of April, 2010:

Administrative Judge
Paul B. Abramson, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Paul.Abramson@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
Michael F. Kennedy
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: mfk2@nrc.gov

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

Administrative Judge
Jeffrey D. E. Jeffries
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: jeffrey.jeffries@nrc.gov

Joseph Wojcicki
820 East Steele Rd.
West Columbia, SC 29170
E-mail: joe4ocean@aim.com

Robert Guild, Esq.
Sierra Club and Friends of the Earth
314 Pall Mall Street
Columbia, SC 29201
E-mail: bguild@mindspring.com

Florence P. Belser, Esq.
South Carolina Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
E-mail: fbelser@regstaff.sc.gov

Susan Corbett
Sierra Club of South Carolina
1314 Lincoln Street, Suite 211
Columbia, SC 29202
E-mail: jscorbett@mindspring.com

Randolph R. Mahan, Esq.
Associate General Counsel for Major
Projects
SCANA Corp.
1426 Main Street
Columbia, SC 29201
E-mail: rmahan@SCANA.com

Kathryn M. Sutton, Esq.
Lawrence J. Chandler, Esq.
Martin O'Neill, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail: ksutton@morganlewis.com;
lchandler@morganlewis.com;
martin.o'neill@morganlewis.com

/Signed (electronically) by/
Russell E. Chazell
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-5003
Russell.Chazell@nrc.gov