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RULEMAKINGS AND  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	March 29, 2011

**APPLICANT'S MOTION TO STRIKE PORTIONS OF HUDSON RIVER SLOOP  
CLEARWATER, INC.'S REPLY AND ASSOCIATED DECLARATIONS**

**I. INTRODUCTION**

In accordance with 10 C.F.R. § 2.323(a), Entergy Nuclear Operations, Inc. ("Entergy"), Applicant in the above-captioned proceeding, files this motion to strike the new supporting information contained in the "Combined Reply to NRC Staff and Entergy's Answers in Opposition to Clearwater's Motion for Leave and Petition to Amend Contention EC-3" ("Reply"), filed by Hudson River Sloop Clearwater, Inc. ("Clearwater") on March 21, 2011. Specifically, Entergy moves to strike the new "Declaration of Drew Claxton Regarding Hudson River Sloop Clearwater, Inc.'s Combined Reply to NRC Staff and Entergy's Answer to Amended Environmental Justice Contention" ("Claxton Declaration"); the new "Declaration of Stephen Filler in Support of Hudson River Sloop Clearwater, Inc.'s Combined Reply to NRC Staff and Entergy's Answer to Amended Environmental Justice Contention (EC-3)" ("Filler Declaration") and its associated exhibits; and the portions of the Reply that discuss these new Declarations.<sup>1</sup>

<sup>1</sup> All of these March 21, 2011 filings currently are not yet publicly available on ADAMS.

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As discussed below, in its Reply, Clearwater impermissibly includes new supporting declarations, exhibits, and arguments not included in Amended Contention EC-3 filed on February 3, 2011.<sup>2</sup> Despite the presentation of new supporting information and factual arguments, Clearwater does not address or satisfy the standards governing late-filed contentions set forth in 10 C.F.R. § 2.309(c) and (f)(2). Accordingly, this new information should be stricken.

## II. BACKGROUND

On February 3, 2011, Clearwater proposed three amendments to previously-admitted Contention EC-3. The proposed Amended Contention discussed certain information included in the U.S. Nuclear Regulatory Commission (“NRC”) Staff’s Final Supplemental Environmental Impact Statement (“FSEIS”),<sup>3</sup> but did not include any supporting factual declarations or attachments. On March 7, 2011, Entergy and the NRC Staff each filed answers opposing Clearwater’s Amended Contention on numerous grounds, principally because the first proposed contention amendment improperly challenged the adequacy of emergency plans,<sup>4</sup> and the second and third proposed contention amendments were untimely,<sup>5</sup> did not raise a material issue,<sup>6</sup> lacked

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<sup>2</sup> See Motion for Leave to Amend and Extend Contention EC-3 Regarding Environmental Justice and Petition to Do So (Feb. 3, 2011) (“Amended Contention”), available at ADAMS Accession No. ML110410369.

<sup>3</sup> NUREG-1437, Supp. 38, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Units Nos. 2 and 3, Final Report* (Dec. 2010) (“FSEIS”), available at ADAMS Accession Nos. ML103350405 (Vol. 1), ML103350438 (Vol. 2), ML103360209 (Vol. 2), ML103360212 (Vol. 2), ML103350442 (Vol. 3).

<sup>4</sup> See Applicant’s Answer to Hudson River Sloop Clearwater, Inc.’s Amended Environmental Justice Contention at 10 (Mar. 7, 2011) (“Applicant Answer”), available at ADAMS Accession No. ML110770579; NRC Staff’s Answer to Amended and New Contention (EC-3) by Hudson River Sloop Clearwater, Inc. Concerning the Final Supplemental Environmental Impact Statement at 8-9 (Mar. 7, 2011) (“NRC Staff Answer”), available at ADAMS Accession No. ML110670293.

<sup>5</sup> See Applicant Answer at 11-13, 19-20; NRC Staff Answer at 9-12.

<sup>6</sup> See Applicant Answer at 14-15; NRC Staff Answer at 12-17, 20.

support in the form of alleged facts or expert opinion,<sup>7</sup> and failed to raise a genuine dispute on a material issue of law or fact.<sup>8</sup>

On March 21, 2011, Clearwater filed its Reply with the new supporting Claxton and Filler Declarations and several new exhibits. As discussed in Section IV below, these untimely new Declarations and exhibits, and the associated portions of the Reply should be stricken from the record pursuant to 10 C.F.R. § 2.319.

### III. LEGAL STANDARDS

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties' answers.<sup>9</sup> A reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the proposed contention, and may not attempt to cure an otherwise deficient contention.<sup>10</sup> As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request [or, in this case, a newly-proposed contention amendment]. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due,

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<sup>7</sup> See Applicant Answer at 15-16, 20-21; NRC Staff Answer at 17-18, 19-20.

<sup>8</sup> See Applicant Answer at 16-18, 21-22; NRC Staff Answer at 20-21.

<sup>9</sup> See *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

<sup>10</sup> See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Licensing Board Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011) (unpublished), available at ADAMS Accession No. ML110490269 ("Davis-Besse Order") (granting a motion to strike specified portions of a reply brief because the relevant "portions of the Combined Reply and the Attachment impermissibly attempt to expand the scope of Contention 4 and attempt to add new bases and supporting material for the contention"); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (granting in part a motion to strike and finding that petitioners impermissibly "expand[ed] their arguments" by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contention); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-63 (refusing to consider references to various documents identified in a petitioner's reply that were not included in the original petition), *aff'd*, CLI-06-17, 63 NRC 727 (2006).

unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).<sup>11</sup>

This prohibition on new arguments in replies reflects the Commission's interest in conducting adjudicatory hearings efficiently and consistent with basic principles of fairness.<sup>12</sup> As the Commission has explained, given the increasing adjudicatory docket, it is important for parties to adhere to the Commission's pleading standards and for the Board to enforce those standards.<sup>13</sup> Absent such discipline and preparedness on the part of petitioners, petitioners would be free to ignore the timeliness requirements every time they thought of a new argument or a new way to add support to a proposed contention.<sup>14</sup>

Accordingly, a petitioner must include all of its arguments and claims in its initial filing. Allowing a petitioner to amend or supplement its pleadings in reply to the applicant's or NRC Staff's answer would defeat the purpose of the Commission's contention pleading requirements by allowing a petitioner to initially file vague or unsupported contentions, and then simply revise and add support for them later.<sup>15</sup>

Moreover, because NRC regulations do not allow the applicant to respond to a petitioner's reply,<sup>16</sup> principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the Applicant's or the NRC Staff's Answers. Allowing new claims in a reply not only defeats the contention-filing deadline, it also unfairly deprives other participants

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<sup>11</sup> *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

<sup>12</sup> *See La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) ("The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.").

<sup>13</sup> *La. Energy Servs.*, CLI-04-25, 60 NRC at 225.

<sup>14</sup> *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003), *quoted with approval in La. Energy Servs.*, CLI-04-25, 60 NRC at 224-25.

<sup>15</sup> *See La. Energy Servs.*, CLI-04-35, 60 NRC at 622-23.

<sup>16</sup> *See* 10 C.F.R. § 2.309(h)(3).

of an opportunity to rebut the new claims.<sup>17</sup> Thus, in Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.<sup>18</sup> Any such new and improper arguments should be stricken from the record.<sup>19</sup>

**IV. THE BOARD SHOULD STRIKE CLEARWATER'S REPLY IN PART AND THE CLAXTON AND FILLER DECLARATIONS IN THEIR ENTIRETY**

As detailed below, Clearwater's Reply relies on new factual information and arguments that were not submitted with the Amended Contention, and therefore should be stricken. First, the Board admitted original Contention EC-3 only with respect to Clearwater's argument that the environmental justice evaluation allegedly failed to address disparate impacts on minority and low-income populations in nearby institutions.<sup>20</sup> Clearwater's first proposed amendment to admitted Contention EC-3 involved only what Clearwater called a "technical change" to the previously-admitted contention to reference the FSEIS.<sup>21</sup> In its Reply, Clearwater now claims for the first time—citing the new Claxton Declaration for support—that the first proposed contention amendment also covers broader elements of the general population that have reduced access to private transportation.<sup>22</sup> Accordingly, Entergy seeks to strike the portions of the Reply

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<sup>17</sup> See *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>18</sup> *La. Energy Servs.*, CLI-04-25, 60 NRC at 225. See also *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (explaining that a reply should be narrowly focused on the legal or logical arguments presented in the other party's answer).

<sup>19</sup> A licensing board has the authority to strike individual arguments and declarations. See, e.g., 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary "to take appropriate action to control the prehearing . . . process"). See also *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 376-77, 399-400, 429 (2008) (granting the applicant's motion to strike portions of petitioners' reply that contained new arguments and factual allegations (including a new affidavit and reports) in an attempt to cure deficiencies in the proposed contentions in the petition to intervene); *Davis-Besse Order* at 3-4 (striking specified new material filed in reply that expanded the scope of a proposed contention through new bases and supporting material).

<sup>20</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 200-01 (2008).

<sup>21</sup> See Amended Contention at 16, 19.

<sup>22</sup> Reply at 1-2 ("Therefore, with this reply Clearwater is merely clarifying by showing that this contention is broader than any specific institutionalized population and indeed extends to areas where there is differential access to transportation."), 18 ("Furthermore, there are a disproportionate number of local minority or low-

quoted in the previous footnote as well as the entire Claxton Declaration because Clearwater has improperly attempted to expand the scope of the Amended Contention.

Second, Clearwater's Reply also includes the Filler Declaration and, on pages 12 to 14 of the Reply, extensively discusses the new information in that Declaration. The Filler Declaration in turn included seventeen exhibits, totaling more than 50 pages. Although the Reply fails to substantively confront the points made in Entergy's and the NRC Staff's Answers regarding the irrelevance of the affiliation or motivation of a commenter,<sup>23</sup> this new information improperly adds additional factual detail to Clearwater's Amended Contention. Therefore, the entire Filler Declaration, its associated exhibits, and the portions of the Reply that cite to that Declaration constitute impermissible new supporting material and should be stricken.

By including these new two new Declarations and the new exhibits, Clearwater ignored Commission precedent and the Board's clear ruling in this proceeding that it will not consider information in a reply that could and should have been raised initially in a proposed contention.<sup>24</sup> Not only has the Board explicitly alerted the parties to the relevant standard, but Entergy recently filed a Motion to Strike an earlier Clearwater pleading for similarly exceeding the scope of a permissible reply.<sup>25</sup> Moreover, Clearwater's status as a *pro se* intervenor does not excuse its failure to comply with these requirements—*pro se* participants must comply with and are bound by the same procedural requirements as all other parties, even if limited by resource

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income residents who do not possess their own private transportation.”), 18-19 (indicating that Clearwater is challenging impacts on institutional populations “*and other environmental justice populations* within 50 miles caused by the proposed action”) (emphasis added). See also Claxton Decl. ¶¶ 4-5.

<sup>23</sup> See Applicant Answer at 22; NRC Staff Answer at 13-15.

<sup>24</sup> See *Indian Point*, LBP-08-13, 68 NRC at 161 (“The Board finds . . . these arguments could and should have been raised in its Petition and, having not been raised in the Petition could only be introduced into this proceeding pursuant to 10 C.F.R. § 2.309(c). For these reasons, the Board has not considered the new arguments presented in the Reply.”).

<sup>25</sup> See Applicant's Motion to Strike at 4-6 (Mar. 4, 2011), available at ADAMS Accession No. ML110740285.

constraints.<sup>26</sup> Furthermore, Clearwater introduces these new Declarations, associated exhibits, and new arguments without acknowledging, much less addressing, the late-filing standards set forth in 10 C.F.R. § 2.309(c) or (f)(2).

## V. CONCLUSION

For the foregoing reasons, the Board should strike the new supporting Declarations, exhibits, and the arguments impermissibly provided in Clearwater's Reply.

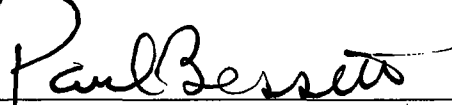
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<sup>26</sup> *Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984)*. Here, Clearwater does not assert that its *pro se* status somehow prevented it from addressing the Commission's regulations.

**CERTIFICATION OF COUNSEL UNDER 10 C.F.R. § 2.323(b)**

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and that my efforts to resolve the issues have been unsuccessful. The NRC Staff supports the relief requested in this motion.

Respectfully submitted,



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Dated in Washington, D.C.  
this 29th day of March 2011



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of )	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC. )	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3) )	
) )	March 29, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Applicant's Motion to Strike Portions of Hudson River Sloop Clearwater, Inc.'s Reply and Associated Declarations" were served this 29th day of March, 2011, upon the persons listed below, by first class mail and e-mail as shown below.

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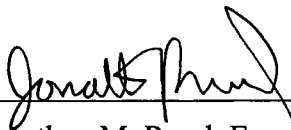
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