

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby submits its answer to "Applicant's Motion to Strike Portions of Hudson River Sloop Clearwater, Inc.'s Reply and Associated Declarations" ("Motion" or "Motion to Strike") filed by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on March 29, 2011.¹ In its Motion, Entergy seeks to strike the new declarations and supporting documents attached to 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 and the portions of the Reply that discuss those new declarations. For the reasons stated in the Applicant's Motion and the reasons set forth below, the Staff supports the Applicant's Motion and recommends that it be granted.

¹ Applicant's Motion to Strike Portions of Hudson River Sloop Clearwater, Inc.'s Reply and Associated Declarations (March 29, 2011).

BACKGROUND

On November 30, 2007, Clearwater filed a petition to intervene in this license renewal proceeding and filed six environmental contentions. The Atomic Safety and Licensing Board ("Board") re-framed Clearwater Contention EC-3 and admitted it. The contention, as admitted by the Board, asserts: "The EJ analysis in the [Applicant's Environmental Report] does not adequately assess the impacts of Indian Point on the minority, low-income and disabled populations in the surrounding area."² On February 3, 2011, Clearwater sought leave to amend Contention EC-3 in light of the issuance of the Final Supplemental Environmental Impact Statement ("FSEIS") concerning license renewal of Indian Point Units 2 and 3, issued by the Staff on December 3, 2010.³ Clearwater submitted no exhibits or declarations in support of its amended contention. The Staff and the Applicant filed their answers to Clearwater's amendment to Contention EC-3 on March 7, 2011. Clearwater's reply to the Staff's and Applicant's answers, filed on March 21, 2011, included new declarations by Drew Claxton and Stephen Filler.⁴ The Stephen Filler declaration was accompanied by seventeen new exhibits. On March 29, 2011, the Applicant filed its Motion to Strike the declarations, exhibits, and the portions of Clearwater's reply that discuss the new declarations and exhibits.

² *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 219 (July 31, 2008).

³ NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (December 2010).

⁴ 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, March 21, 2011 ("Claxton Declaration"); 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), March 21, 2011 ("Filler Declaration").

DISCUSSION

I. Legal Standard for Content of a Reply

It is well established that a reply to an answer to a petition to intervene or a contention may not raise new arguments, new contention bases or new issues in an attempt to cure a defective petition or contention. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004); *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). The Commission requires strict adherence to contention admissibility standards, demanding discipline and preparedness on the part of petitioners. *LES*, CLI-04-25, 60 NRC at 224-225. Because contentions must be based on documents or other information available at the time the petition is filed, as set forth in 10 C.F.R. § 2.309(f)(2), untimely attempts to amend a defective, original petition or contention are to be rejected as failing to satisfy the late-filing factors in 10 C.F.R. §§ 2.309(c) and (f)(2). See *Palisades*, CLI-06-17, 63 NRC at 732. Thus, the Commission has observed that allowing petitioners to use “reply briefs to provide, for the first time, the necessary threshold support for contentions . . . would effectively bypass and eviscerate [the Commission’s] rules governing timely filing, contention amendment, and submission of late-filed contentions.” *LES*, CLI-04-35, 60 NRC at 623. Further, raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Palisades*, CLI-06-17, 63 NRC at 732.

Likewise, the Commission has held that petitioners may not use a reply to reinvigorate thinly supported contentions. *LES*, CLI-04-25, 60 NRC at 224. Nor may petitioners “initially file vague, unsupported, and generalized allegations and simply recast, support or cure them later.” *LES*, CLI-04-35, 60 NRC at 622. Although petitioners are not required “to prove their case, or to provide an exhaustive list of possible bases,” they are required to provide “sufficient alleged factual or legal bases to support the contention, and to do so at the outset.” *Id.*; see also

Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3) CLI-08-17, 68 NRC 231, 237 n.27 (2008).

In applying these standards, Boards have struck, or declined to consider, new information and argument offered for the first time in a reply. See e.g. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198-199 (2006); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LPB-07-04, 65 NRC 281, 301-302 (2007).

II. Clearwater's New Information and Arguments Should Be Stricken

Clearwater's reply and the new declarations, exhibits and argument submitted therein do not address the issues raised in the answers filed by the Applicant and the Staff, and do not constitute a permissible reply. In its Reply, Clearwater provided new information in the form of declarations by Mr. Filler and Mr. Claxton. Mr. Filler's declaration proffered information regarding a number of environmental groups and was accompanied by seventeen new exhibits. Mr. Claxton's declaration proffered information regarding minority and low-income populations in Peekskill, New York and questions the feasibility of evacuating residents from schools, nursing homes, assisted living facilities, group homes and shelters, hospitals, and correctional facilities and jails. In addition, Mr. Claxton asserted that Peekskill has a higher percentage of residents without private transportation than higher-income communities. Based on Mr. Claxton's declaration, Clearwater argued that the NRC Staff should assess the disparate impact of a severe accident on the minority and low-income population that have reduced access to private transportation.

Clearwater's submission of these new declarations, exhibits and arguments constitutes an impermissible attempt to expand the bases and scope of Contention EC-3. Clearwater could have submitted all of the information in the Filler and Claxton Declarations and the new exhibits when it filed its amendment to Contention EC-3 in February 2011; had it done so, the Staff and

the Applicant would have then had an opportunity to address the admissibility and timeliness of that additional material. Clearwater should not be allowed to use its Reply brief to expand the basis for its contention. *Millstone*, CLI-08-17, 68 NRC at 237 n.27. Furthermore, Contention EC-3, as originally filed, as re-framed by the Board, and as proffered in amended form in February 2011, did not include the argument regarding reduced access to private transportation. In accordance with established Commission rulings, Clearwater's new argument cannot be raised in a reply. *LES*, CLI-04-25, 60 NRC at 224-225. To allow this information and argument in at this point, when the other parties have no opportunity to address them in a substantive way, would be unfair. *Palisades*, CLI-06-17, 63 NRC at 732. Moreover, Clearwater's submission of its new information and argument in its reply is untimely, as all such information and argument were required to be filed as part of its FSEIS contentions on February 3, 2011.

CONCLUSION

The Applicant's Motion correctly observes that the Reply filed by Hudson River Sloop, Clearwater, Inc. includes new arguments and information in support of Clearwater Contention EC-3 that are impermissible in a reply brief. Accordingly, the Staff submits that the Applicant's Motion to Strike should be granted.



Beth N. Mizuno
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
(301) 415-3122
Beth.Mizuno@nrc.gov

Dated at Rockville, Maryland
this 8th day of April 2011

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO APPLICANT'S MOTION TO STRIKE PORTIONS OF HUDSON RIVER SLOOP CLEARWATER, INC.'S REPLY AND ASSOCIATED DECLARATIONS," dated April 8, 2011, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or by deposit in the U.S. Postal Service, as indicated by an asterisk, with copies by electronic mail, this 8th day of April, 2011:

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Lawrence.McDade@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL.resource@nrc.gov

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Richard.Wardwell@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Dr. Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
190 Cedar Lane E.
Ridgway, CO 81432
E-mail: Kaye.Lathrop@nrc.gov

Josh Kirstein, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: Josh.Kirstein@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
(Via Internal Mail Only)

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of Robert F. Meehan, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
E-Mail: MJR1@westchestergov.com

Kathryn M. Sutton, Esq.*
Paul M. Bessette, Esq.
Jonathan Rund, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: jrund@morganlewis.com

John J. Sipos, Esq.*
Charlie Donaldson, Esq.
Assistants Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224
E-mail: John.Sipos@ag.ny.gov

Martin J. O'Neill, Esq.*
Morgan, Lewis & Bockius, LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
E-mail: martin.o'neill@morganlewis.com

Janice A. Dean, Esq.*
Assistant Attorney General,
Office of the Attorney General
of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
E-mail: Janice.Dean@ag.ny.gov

Elise N. Zoli, Esq.*
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: ezoli@goodwinprocter.com

Joan Leary Matthews, Esq.*
Senior Attorney for Special Projects
New York State Department of
Environmental Conservation
Office of the General Counsel
625 Broadway, 14th Floor
Albany, NY 12233-1500
E-mail: jmatthe@gw.dec.state.ny.us

William C. Dennis, Esq.*
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
E-mail: wdennis@entergy.com

John Louis Parker, Esq.*
Office of General Counsel, Region 3
New York State Department of
Environmental conservation
21 South Putt Corners Road
New Paltz, NY 12561-1620
E-mail: jlparker@gw.dec.state.ny.us

Daniel E. O'Neill, Mayor*
James Seirmarco, M.S.
Village of Buchanan
Municipal Building
Buchanan, NY 10511-1298
E-mail: yob@bestweb.net
E-mail: smurray@villageofbuchanan.com

Robert Snook, Esq.*
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CN 06141-0120
E-mail: robert.snook@ct.gov

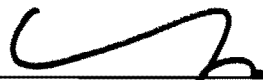
Phillip Musegaas, Esq.*
Deborah Brancato, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
E-mail: phillip@riverkeeper.org
dbrancato@riverkeeper.org

Michael J. Delaney, Esq.*
Director, Energy Regulatory Affairs
New York City Department of Environmental
Protection
59-17 Junction Boulevard
Flushing, NY 11373
E-mail: mdelaney@dep.nyc.gov

Manna Jo Greene*
Stephen Filler
Hudson River Sloop Clearwater, Inc.
724 Wolcott Avenue
Beacon, NY 12508
E-mail: mannajo@clearwater.org
E-mail: stephenfiller@gmail.com

Daniel Riesel, Esq.*
Thomas F. Wood, Esq.
Ms. Jessica Steinberg, J.D.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
E-mail: driese@sprlaw.com
jsteinberg@sprlaw.com

Ross H. Gould, Esq.*
270 Route 308
Rhinebeck, NY 12572
T: 917-658-7144
E-mail: rgouldesq@gmail.com



Beth N. Mizuno
Counsel for NRC Staff