UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-014-COL & 52-015-COL
TENNESSEE VALLEY AUTHORITY	)	
	)	September 22, 2011
(Bellefonte Nuclear Power Plant, Units 3 and 4)	)	

TENNESSEE VALLEY AUTHORITY'S MOTION TO STRIKE INTERVENORS' REPLY TO ANSWERS TO THE FUKUSHIMA TASK FORCE REPORT CONTENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323,[1] Tennessee Valley Authority ("TVA") moves to strike the Reply filed by the Intervenors on September 19, 2011[2] to TVA's and the Nuclear Regulatory Commission ("NRC") Staff's Answers[3] to the August 11, 2011 proposed new contention that claims to address the safety and environmental implications of the NRC Task Force Report, "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" ("Task Force Report").[4]

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1 In compliance with 10 C.F.R. § 2.323(b), TVA certifies that it contacted the NRC Staff and the Intervenors and made a sincere effort to resolve the issues raised in this motion. The Intervenors do not agree with the motion. The NRC Staff supports this motion.

2 Intervenors' Memorandum in Reply to Oppositions to Admission of New Contention (Sept. 13, 2011) ("Reply") with Certificate of Service (Sept. 19, 2011). The "Intervenors" are the Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy.

3 Tennessee Valley Authority's Answer in Opposition to Proposed Contention Regarding Fukushima Task Force Report (Aug. 25, 2011) ("TVA Answer"); NRC Staff Answer to Joint Intervenors' Motion to Admit New Contention Regarding the Safety and Environmental Implications of the NRC Task Force Report on the Fukushima Dai-ichi Accident (Sept. 6, 2011) ("Staff Answer").

4 Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011); Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011); Declaration of Dr. Ross McCluney Regarding Environmental and Safety Issues

As explained below, the Reply should be stricken in its entirety because it was filed late without good cause. Additionally, even if the Reply were timely, portions of the Reply should be stricken because they include new arguments not within the scope of the original proposed contention without satisfying the standards governing late-filed contentions set forth in 10 C.F.R. §§ 2.309(c) and (f)(2).

II. THE REPLY IS UNTIMELY

On August 23, 2011, the Atomic Safety and Licensing Board ("Board") issued an Order regarding the timing of pleadings related to the proposed contention.[5] The Order stated that "any reply by Joint Intervenors to the TVA and/or staff responses to Joint Intervenors motion to admit a new contention regarding the Fukushima I accident *shall be filed within seven days after the staff's response is submitted*."[6] Because the Staff Answer was filed on September 6, 2011, the Reply was due on September 13, 2011. The Intervenors, however, did not file their Reply until September 19, 2011—six days late. Therefore, the Reply is untimely.

In accordance with 10 C.F.R. § 2.307(a), the Board may grant extensions of time only for "good cause." Additionally, the Initial Prehearing Order states that motions for extension of time to file pleadings must be submitted at least three business days before the due date, must indicate whether the request is opposed, and must "demonstrate appropriate cause" supporting the extension.[7] While extensions of time may be granted under some circumstances, extensions

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at Nuclear Power Plants Based on Events at Fukushima and the Findings of the NRC Interim Task Force (Aug. 11, 2011) ("McCluney Declaration").

5 Licensing Board Order (Granting Motions to Exceed Page Limit and for Extension of Time to File NRC Staff Response) (Aug. 23, 2011) (unpublished).

6 *Id.* at 2 (emphasis added).

7 Licensing Board Memorandum and Order (Initial Prehearing Order) at 6 n.4 (June 18, 2008) (unpublished); *see also Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 125 (1977) ("[W]e expect litigants to make every reasonable effort to comply with [time] limits and, should additional time nevertheless prove necessary, to make timely application for an extension." Additionally, any late document following an unforeseen development "must, however, be accompanied . . . by a motion for leave to

should only be granted "when warranted by unavoidable and extreme circumstances."[8] The Intervenors, however, did not request an extension, did not discuss the delay with TVA, and did not attempt to demonstrate "appropriate cause" (*i.e.*, "unavoidable and extreme circumstances") for their late Reply.

In the Reply, the Intervenors' only explanation for this delay is a statement in the Certificate of Service that: "Service delayed because of new VeriSign Certificate installation." This simply does not meet the standard of unavoidable and extreme circumstances.[9] Additionally, if the Intervenors were having problems with filing the Reply, they were under an affirmative obligation to attempt to file the document using another method, such as electronic mail or even First Class mail; here, the Intervenors took no action and ignored the requirements of the Initial Scheduling Order. As the Commission has stated, "parties to a proceeding . . . are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing and the scheduling orders in the proceeding," and "licensing boards are expected to take appropriate actions to enforce compliance with these schedules."[10] For these reasons, the Reply was untimely without good cause, and should be stricken in its entirety.

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file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted. This is so irrespective of the extent of the lateness.").

8 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998); *see also Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998) (holding that "construction of 'good cause' to require a showing of 'unavoidable and extreme circumstances' constitutes a reasonable means of avoiding undue delay"); *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87210), CLI-99-1, 49 NRC 1, 3 n.2 (1999) ("We caution all parties in this case, however, to pay heed to the guidance in our policy statement that ordinarily only 'unavoidable and extreme circumstances' provide sufficient cause to extend filing deadlines."). The Commission has affirmed use of the "unavoidable and extreme circumstances" test from *Calvert Cliffs* and the Statement of Policy on Conduct of Adjudicatory Proceedings in the context of late filings. *See Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), CLI-10-26, 72 NRC __, slip op. at 2-3 & nn.10-11 (Sept. 29, 2010).

9 Additionally, in TVA's experience, a new certificate does not take six days to install, and the need for such an installation does not arise without some notice from the NRC.

10 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 21; *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC

III. ARGUMENTS IN THE REPLY SHOULD BE STRICKEN

A. Legal Standards

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties' answers. 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 original petition, and may not attempt to cure an otherwise deficient contention. 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. 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, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).[11]

The Commission's prohibition on new arguments in replies is rooted in the Commission's interest in conducting adjudicatory hearings efficiently and on basic principles of fairness. The Commission has recognized that "[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount."[12] It has further stated:

> NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they realize[d] . . . that maybe there was something after all to a

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419, 428 (2003) (stating with respect to late arguments by one of the Intervenors that "there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements"); *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) ("LES") ("As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.").

11 *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citation omitted).

12 *LES*, CLI-04-25, 60 NRC 225.

> challenge it either originally opted not to make or which simply did not occur to it at the outset.[13]

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 answers would run afoul of the Commission's clear directives:

> Allowing contentions to be added, amended, or 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. 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.[14]

Moreover, because NRC regulations do not allow the applicant to respond to a petitioner's reply,[15] principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the applicant's or NRC Staff's answer. "Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims."[16] Thus, "[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."[17] Any improper arguments should be stricken.[18]

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13 *McGuire/Catawba*, CLI-03-17, 58 NRC 428-29 (internal quotation marks and citations omitted), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

14 *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes and citation omitted).

15 *See* 10 C.F.R. § 2.309(h)(3).

16 *Palisades*, CLI-06-17, 63 NRC at 732.

17 *LES*, CLI-04-25, 60 NRC at 225; *see also* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) ("Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.").

18 A licensing board has the authority to strike individual arguments and exhibits. *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, 407, 429 (2008) (granting the applicant's motion to strike portions of

B. Bases for Striking Arguments

Aside from being late, the Reply raises two sets of arguments that should be stricken because they raise new issues.[19]

The first issues that should be stricken are the Intervenors' new arguments regarding seiches. The Reply includes a new discussion of seiches, claiming that contrary to the Final Safety Analysis Report ("FSAR"), seiches occurred on the Tennessee River following the 1964 earthquake in Alaska. The Reply states that 10 C.F.R. § 100.23(c) provides its basis; references FSAR Section 2.4.5 for statements that it challenges; and references and provides information from a U.S. Geological Survey ("USGS") Report.[20] This information is not appropriate for a Reply. The proposed contention, the TVA Reply, and the Staff Reply do not reference 10 C.F.R. § 100.23(c), and so it cannot form the basis for the proposed contention at the Reply stage. Additionally, the proposed contention does not reference or challenge FSAR Section 2.4.5, and so these challenges present new arguments for the first time in the Reply. While the TVA

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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).

[19] The Reply (at 2) also raises another issue that was not addressed in the TVA Answer or Staff Answer—that is, the effect of the Commission's recent decision on the Fukushima suspension requests on the proposed contention. *See Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __ (Sept. 9, 2011). In addition to being a new argument not previously raised by Intervenors, TVA notes that the Intervenors are incorrect in claiming that their proposed contention should be admitted notwithstanding CLI-11-05. *See* Reply Attach., at 4 (Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings). To the contrary, in CLI-11-05, the Commission made clear that it does not view the Task Force Report as containing new and significant information that would trigger the need for an immediate generic National Environmental Policy Action ("NEPA") review by the NRC or supplementation of environmental information prepared in connection with individual licensing proceedings such as this one. As the Commission explained: "To merit this additional [NEPA] review, information must be both 'new' and 'significant,' and it must bear on the proposed action or its impacts. As we have explained, '[t]he new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'' *That is not the case here, given the current state of information available to us.*" *Callaway*, CLI-11-05, slip op. at 31 (emphasis added) (citation omitted). The Commission has affirmatively concluded that the Task Force Report does not provide new and significant information. The Intervenors have provided no basis to conclude differently in this proceeding. Therefore, CLI-11-05 directly supports TVA's arguments in the TVA Answer regarding the lack of new and significant information, and the proposed contention should be rejected. *See* TVA Answer at 17-21.

[20] Reply at 2-4.

Answer references FSAR Section 2.4, it did so to show that the issues regarding seismic events and flooding already were evaluated in the FSAR, and were unchallenged by the Intervenors; the Intervenors cannot try to cure this defect in their Reply. Finally, while the McCluney Declaration references the USGS Report,[21] neither the McCluney Declaration nor the proposed contention discusses the information provided in the Reply regarding seiches on the Tennessee River. If the Intervenors wanted to include this information as support for the proposed contention, it was incumbent on them to provide it in the contention, not wait for the Reply.[22]

The second issue that should be stricken is the Intervenors' new argument regarding low water levels. The Intervenors state that they "rely on the Regulatory Basis for determination of whether seiches and other phenomena cause low water levels, a problem as severe as flooding if not more so for TVA power plants during the last few years."[23] The Intervenors allege: "If the site is susceptible to such phenomena, minimum water levels must be verified to be higher than the intake design basis for essential water supplies."[24] This argument regarding low water level is entirely new in the Reply. The proposed contention does not address "low water" in any manner, and this issue was not raised in the TVA Answer or Staff Answer. The Intervenors

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21 McCluney Declaration at 2-3.

22 As discussed in the TVA Answer, the seiche arguments fail for other reasons as well. The arguments are untimely because they rely on an event from over 47 years ago; the proposed contention fails to challenge the evaluation of seismic events or flooding in the FSAR, including evaluation of seiches; and the Task Force Report states that these issues are not a concern for new plants. TVA Answer at 11, 26-27. Furthermore, the Reply takes statements in the FSAR out of context. The seiches on the Tennessee River that are discussed in the USGS Report are all less than 1 foot high, which is far less than the 7 foot screening criterion specified in the FSAR. *See* FSAR, Rev. 1, § 2.4.5. Thus, in context, it is clear that the FSAR is correct in stating that there have been no seiches on the Tennessee River (*i.e.*, no seiches greater than the clearly specified screening criterion of 7 feet).

23 Reply at 4.

24 *Id.* Additionally, aside from being a new argument in the Reply, this argument is untimely for other reasons and does not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). It is untimely because it is based on information that is not new; therefore, this argument could have been raised years ago at the beginning of this proceeding. It does not meet the contention admissibility requirements because there is absolutely no support for the argument and it does not raise a genuine dispute with the application.

provide no explanation or justification for why this argument is raised for the first time in the Reply.

The Board should strike these new arguments that the Intervenors present for the first time in their Reply. These portions of the Reply fail to "focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it."[25] Instead, these portions of the Reply impermissibly attempt to expand the scope of the proposed contention and provide new bases and supporting material for the contention, without addressing the criteria for late-filed or amended contentions in 10 C.F.R. §§ 2.309(c) and (f)(2). The Intervenors cannot now try to bootstrap their initial proposed contention with entirely new information that is not "narrowly focused" on the legal or factual arguments presented in the TVA Answer or Staff Answer,[26] and to which TVA and the NRC Staff have no opportunity to respond. Accordingly, the new arguments identified above should be stricken. The information that should be stricken begins with the heading "Seismic and Flooding Events" on page 2 of the Reply and continues through to the end of page 4 of the Reply.

[25] *Palisades*, CLI-06-17, 63 NRC at 732.

[26] Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

IV. CONCLUSION

For the foregoing reasons, the Board should strike the entire Reply as untimely. Additionally, even if the Reply were timely, the Board should strike the new arguments impermissibly provided in the Reply.

Respectfully submitted,

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Dated in Washington, DC
this 22nd day of September 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I certify that, on September 22, 2011, a copy of "Tennessee Valley Authority's Motion to Strike Intervenors' Reply to Answers to the Fukushima Task Force Report Contention" was served electronically with the Electronic Information Exchange on the following recipients:

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