

May 22, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NEXTERA ENERGY SEABROOK LLC) Docket No. 50-443-LA2
)
(Seabrook Station, Unit 1))
)

NRC STAFF MOTION TO STRIKE PORTIONS OF C-10'S REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the U.S. Nuclear Regulatory Commission (“NRC”) staff (“Staff”) files this motion to strike portions of the “C-10 Research and Education Foundation, Inc. Response to U.S. NRC staff’s answer to C-10 Foundation’s Petition for leave to intervene: Nuclear Regulatory Commission Docket No. 50-443” (“Reply”) filed by the C-10 Research and Education Foundation, Inc. (“C-10”).¹ In response to the Staff’s arguments that C-10’s petition for leave to intervene (“Petition”)² had failed to satisfy C-10’s burden of demonstrating standing,³ C-10 attempts to repair the Petition’s defective standing pleading by providing entirely new details and standing arguments for the first time in its Reply. However, providing entirely new details and standing arguments for the first time in a reply brief is prohibited by long-standing Commission precedent. Accordingly, this Atomic Safety and Licensing Board (“Board) should

¹ C-10 Research and Education Foundation, Inc. Response to U.S. NRC staff’s answer to C-10 Foundation’s Petition for leave to intervene: Nuclear Regulatory Commission Docket No. 50-443 (May 12, 2017) (Agencywide Documents Access and Management System (“ADAMS”) Accession No. ML17132A412) (“Reply”).

² C-10 Research and Education Foundation, Inc. Petition for Leave to Intervene: Nuclear Regulatory Commission Docket No. 50-443 (April 10, 2017) (ADAMS Accession No. ML17100B013) (“Petition”).

³ NRC Staff’s Answer to C-10 Research and Education Foundation, Inc. Petition for Leave to Intervene, at 1 (May 5, 2017) (ADAMS Accession No. ML17125A303) (“Staff Answer”).

strike the new standing details and arguments raised for the first time in C-10's Reply as illustrated in NRC Staff Attachment A.⁴

BACKGROUND

This proceeding concerns the August 1, 2016, NextEra Energy Seabrook, LLC ("NextEra") license amendment request ("LAR") to adopt a methodology to account for the impacts of alkali-silica reaction ("ASR") on concrete structures at Seabrook Station, Unit No. 1 ("Seabrook").⁵ On February 7, 2017, the NRC published a notice of opportunity to request a hearing on the LAR.⁶ On April 10, 2017, C-10 filed its Petition, which requested a hearing on the LAR with respect to ten interrelated contentions.⁷ On May 5, 2017, the Staff filed an answer opposing the granting of the requested hearing due to C-10's failure to establish standing in its Petition.⁸ C-10 filed its Reply on May 12, 2017. The Reply contains entirely new standing details and arguments, which are not authorized under the Commission's long-standing precedent governing reply briefs and which, accordingly, should be stricken.

⁴ NRC Staff Attachment A (Redline Strike-Out Excerpts of C-10's Reply).

⁵ License Amendment Request 16-03, Revise Current Licensing Basis to Adopt a Methodology for the Analysis of Seismic Category I Structures with Concrete Affected by Alkali-Silica Reaction (Aug. 1, 2016) (ADAMS Accession No. ML16216A240) ("LAR").

⁶ Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information, 82 Fed. Reg. 9601, 9604 (Feb. 7, 2017).

⁷ See Petition at 2-3.

⁸ Staff Answer at 1. See also NextEra's Answer Opposing C-10 Research & Education Foundation's Petition for Leave to Intervene and Hearing Request on NextEra Energy Seabrook, LLC's License Amendment Request 16-03, at 2-3 (May 5, 2017) (ADAMS Accession No. ML17125A289) ("NextEra Answer").

DISCUSSION

I. Legal Standards Governing Arguments Raised for the First Time in a Reply Brief

Under the Commission's rules, a petitioner may file a reply to any answer filed in response to its petition to intervene.⁹ The scope of that reply, however, is not unlimited.¹⁰ Instead, the Commission has stated that "a reply cannot expand the scope of the arguments set forth in the original hearing request."¹¹ This includes standing arguments.¹² The purpose of this restriction is to ensure the fundamental fairness of the Commission's proceedings for all participants because "[a]llowing new claims in a reply ... would unfairly deprive other participants of an opportunity to rebut the new claims."¹³ Taken together, this precedent provides that it is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective standing pleading with fresh details or entirely new arguments offered for the first time in a reply.¹⁴

II. The Board Should Strike C-10's New Standing Arguments

C-10 makes several attempts to repair its Petition's defective pleading of standing with entirely new details and arguments offered for the first time in its Reply. Consistent with

⁹ 10 C.F.R. § 2.309(i)(2).

¹⁰ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25, *reconsid. denied*, CLI-04-35, 60 NRC 619 (2004).

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

¹² See *Entergy Nuclear Operations, Inc. & Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 262 n.32 (2008).

¹³ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁴ *Palisades*, CLI-08-19, 68 NRC at 261-62 (quoting *Consumers Energy Co., Nuclear Mgmt. Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527-28 (2007)); *LES*, CLI-04-25, 60 NRC at 224-25 (concurring with the board that "the reply briefs constituted [an impermissible] late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs"); *LES*, CLI-04-35, 60 NRC at 622-23 (stating that the Commission's rules do not allow using reply briefs to provide, for the first time, the necessary arguments to satisfy the Commission's pleading requirements).

Commission precedent, the Board should exercise its authority to strike these arguments.

A. The Board Should Strike C-10's New Representational Standing Argument

C-10's Petition did not address, let alone demonstrate, that C-10 satisfied the requirements for representational standing. For instance, the Petition did not identify any specific member of C-10 and did not provide an affidavit or other evidence to show that any identified member had authorized C-10 to represent him or her and to request a hearing on his or her behalf.¹⁵ Instead, in the Petition, C-10 only asserted, in general terms, that "most of [its] members reside in the communities adjacent to [Seabrook]" and that the people that it represents are "the citizens within a ten-mile radius of [Seabrook]."¹⁶ Additionally, the Petition did not allege a specific injury-in-fact to any identified member of C-10 and trace that injury to the LAR.¹⁷ Instead, in the Petition, C-10 only asserted, in general terms, that the NRC's approval of the Seabrook LAR "could put the public at serious risk by allowing NextEra to continue to operate Seabrook ... with no way to adequately remedy [its] deteriorating concrete" and could have "potentially disastrous consequences for the safety of surrounding communities."¹⁸

In its Answer, the Staff identified these fatal deficiencies in the Petition.¹⁹ C-10, then, attempted to repair these deficiencies by offering an entirely new representational standing argument for the first time in its Reply. Specifically, C-10 argues in its Reply that its Executive Director, Natalie Hildt Treat, should be considered an identified member of C-10 and that the Petition itself should be considered Ms. Treat's personal affidavit satisfying the Commission's

¹⁵ See Staff Answer at 14-16, 20-21.

¹⁶ Petition at 1.

¹⁷ See Staff Answer at 14-16, 20-21.

¹⁸ Petition at 1-2.

¹⁹ Staff Answer at 14-16, 20-21.

representational standing requirements.²⁰ The Reply also asserts, for the first time, that Ms. Treat works within the Seabrook Emergency Planning Zone (“EPZ”), lives approximately 3.5 miles from Seabrook, and “has a family that includes a young child.”²¹ The Reply alleges, again for the first time in this proceeding, entirely new hypothetical injuries to Ms. Treat in her personal capacity as well as entirely new conclusory arguments that these injuries are traceable to the LAR. Specifically, the Reply states that “a failure of the concrete structure underpinning the Spent Fuel Pool due to the combination of ASR-weakened concrete and a greater-than-expected earthquake could cause the loss of cooling water sufficient for waterborne and airborne radioactive releases” and cause Ms. Treat “possible physical, psychological, emotional, and financial consequences.”²²

The Board should strike from the Reply this argument regarding representational standing with respect to Ms. Treat in her personal capacity because it is an entirely new argument that was not included in the Petition. Besides Ms. Treat’s signature on the Petition reflecting that she had submitted, in her official capacity as C-10’s Executive Director, the Petition on behalf of C-10, there was no discussion in the Petition of Ms. Treat, the nature of her right under the AEA, in her personal capacity, to be made a party to the proceeding, the nature and extent of her property, financial, or other interest in the proceeding, separate from the organizational interest of C-10, or the possible effect of any order in the proceeding on this interest.²³ Therefore, there was no notice that C-10 was advancing this argument in its Petition

²⁰ Reply at 2-3.

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ See 10 C.F.R. § 2.309(d) (stating that a petition must state “(i) The name, address and telephone number of the requestor or petitioner; (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding; (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest”) and *Consumers Energy Co., Nuclear Mgmt. Co., LLC, Entergy Nuclear Palisades, LLC & Entergy Nuclear Operations, Inc.* (Palisades

and, accordingly, consistent with Commission precedent, the Board should exercise its authority to strike this new argument as shown in NRC Staff Attachment A.²⁴

B. The Board Should Strike C-10's New Organizational Standing Argument

C-10's Petition also did not address, let alone demonstrate, that C-10 satisfied the requirements for organizational standing itself. The only information that C-10 provided in its Petition that was potentially related to organizational standing was that C-10 identified itself as an organization, provided the address of its office, and stated that this address was "located within the EPZ of Seabrook."²⁵ However, the Petition never alleged a specific injury-in-fact to C-10 and how such an injury could be traced to the LAR.²⁶ Instead, the Petition only asserted hypothetical injuries to the public in general such as through its discussion of "serious risk" to "the public" and "potentially disastrous [safety] consequences" to the "surrounding communities" posed by the "radioactive substances contained within the [containment structures and spent fuel pool] walls."²⁷ Additionally, the Petition only sought a "[c]omplete picture of the actual state of concrete degradation" for "the surrounding communities" and to "reassure the surrounding families" and argued that the proprietary information in the Seabrook LAR should be made public for "citizens concerned with safety protocols in the nuclear industry."²⁸

Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007) (stating that "[t]he member seeking representation must qualify for standing in his or her own right").

²⁴ Moreover, to the extent that the signature of Christopher Nord, that was added to the Reply but was not included in the Petition and that states that Mr. Nord is a "[r]esident of Newbury, [Massachusetts]," Reply at 7, is intended as an additional argument for representational standing, this argument would also be entirely new and, therefore, the Board should not entertain it.

²⁵ Petition at 1.

²⁶ See Staff Answer at 16-20, 21-23.

²⁷ Petition at 1-2, 6, 8. See also *id.* at 6 ("endanger the public health and safety").

²⁸ *Id.* at 2, 6, 8.

In its Answer, the Staff identified these fatal deficiencies in the Petition.²⁹ C-10, then, attempted to repair these deficiencies by offering an entirely new organizational standing argument for the first time in its Reply. Instead of only alleging injuries to the public in general, C-10's Reply attempts to assert, for the first time, injuries to C-10's organizational interests. Specifically, the Reply states that, in the event of a radiological release, Ms. Treat would "run for her child and leave the area, making it impossible for her to effectively discharge her duties as C-10's Executive Director" and that "it could become impossible to visit crucial C-10 radiation monitoring sites to perform needed maintenance and repairs, without suffering the consequences of radiation exposure."³⁰ Additionally, C-10 attempts to trace, for the first time in the Reply, these hypothetical injuries to the LAR by stating that a radiological release could be caused by "a failure of the concrete structure underpinning the Spent Fuel Pool due to the combination of ASR-weakened concrete and a greater-than-expected earthquake...."³¹

The Board should strike from the Reply this argument regarding organizational standing because it is an entirely new argument that was not included in the Petition. There was no discussion in the Petition of any specific injury to C-10 and how such an injury could be traced to the LAR; the Petition only alleged non-specific injuries to the public in general and did not attempt to trace these injuries to the LAR.³² Therefore, there was no notice that C-10 was advancing this argument in its Petition and, accordingly, consistent with Commission precedent,

²⁹ Staff Answer at 16-20, 21-23.

³⁰ Reply at 3.

³¹ *Id.* Also, this new traceability argument is without merit because, pursuant to 10 C.F.R. Part 50, Appendix A, nuclear power plants are not required to withstand any "greater-than-expected earthquake" that may be imagined; they are required to withstand the effects of the most severe of earthquakes that have been historically reported for the site and surrounding area, with sufficient margin for the limited accuracy, quantity, and period of time in which the historical data have been accumulated.

³² See Staff Answer at 16-20, 21-23.

the Board should exercise its authority to strike this new argument as shown in NRC Staff Attachment A.

C. The Board Should Strike C-10's New Arguments that Standing Should be Assumed

In the Petition, C-10 did not argue that its standing in this proceeding should be assumed. In the Reply, however, C-10 argues for the first time that it was not required to make specific standing arguments in its Petition because, according to C-10, the NRC (1) already knew these arguments and (2) already knew that C-10 had an interest in the public health and safety with respect to Seabrook.³³ Specifically, for the first time in its Reply, C-10 attempts to trace a radiological release to the LAR by proposing a scenario in which “the concrete structure underpinning the [Seabrook] Spent Fuel Pool [fails] due to the combination of ASR-weakened concrete and a greater-than-expected earthquake” and excuses itself from not having made such an argument in its Petition by stating that the NRC already knows this information because it is the NRC and “for [the NRC] everything stated here is fundamental to the discharge of [its] responsibilities as the NRC.”³⁴ Additionally, for the first time in its Reply, C-10 suggests that it should be granted standing because it has previously submitted to the NRC a 10 C.F.R. § 2.206 petition for agency action and a 10 C.F.R. § 2.802 petition for rulemaking.³⁵

The Board should strike from the Reply these standing arguments because they are entirely new arguments that were not included in the Petition. Therefore, there was no notice

³³ Reply at 3.

³⁴ *Id.* Also, this new argument is without merit because standing cannot be assumed; rather, C-10 bears the burden of affirmatively demonstrating standing in its Petition. See *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 139 (2010); *Exelon Generation Co, LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 581 (2005).

³⁵ Reply at 3. Also, this new argument is without merit because standing is only determined based on pleadings made in the proceeding at hand, without reference to other proceedings. See *Bell Bend*, CLI-10-07, 71 NRC at 138 (“[C]ase law is clear that a petitioner must make a fresh standing demonstration in *each* proceeding in which intervention is sought because a petitioner’s circumstances may change from one proceeding to the next.”).

that C-10 was advancing these arguments in its Petition and, accordingly, consistent with Commission precedent, the Board should exercise its authority to strike these new arguments as shown in NRC Staff Attachment A.

CONCLUSION

The Board has the power to, on motion or on its own initiative, strike any portion of a written presentation that is irrelevant, immaterial, unreliable, duplicative, or cumulative, in furtherance of its duty to conduct a fair and impartial hearing.³⁶ Accordingly, and consistent with Commission precedent, the Board should strike the entirely new standing details and arguments from C-10's Reply, as identified in NRC Staff Attachment A.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 22nd day of May, 2017

³⁶ 10 C.F.R. § 2.319.

CONSULTATION CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), I hereby certify that the Staff has made a sincere effort to contact the other participants in this proceeding and resolve the issues raised in the above motion. C-10 stated that it will object to any motion to strike portions of its reply dated May 12, 2017, because it does not believe that the reply was out of the scope of its initial petition to intervene in NRC Docket No. 50-443 and that it will respond when the motion is filed. NextEra stated that it does not object to the Staff's proposed motion.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 22nd day of May, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NEXTERA ENERGY SEABROOK LLC) Docket No. 50-443-LA2
)
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)

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF MOTION TO STRIKE PORTIONS OF C-10'S REPLY," dated May 22, 2017, and NRC Staff Attachment A have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 22nd day of May, 2017.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 22nd day of May, 2017