

December 1, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
Duke Energy Carolinas, LLC) Docket Nos. 50-269/270/287 SLR
Oconee Nuclear Station,)
Units 1, 2 & 3)

**PETITIONERS' RESPONSE TO DUKE ENERGY CAROLINAS LLC'S
MOTION TO STRIKE PORTION OF PETITIONERS' REPLY**

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") Order of November 16, 2021, Petitioners, Beyond Nuclear and the Sierra Club, hereby respond to Duke Energy Carolinas, LLC's ("Duke's") Motion to Strike Portion of the Reply Filed by Beyond Nuclear and the Sierra Club (Nov. 15, 2021) ("Motion"). Duke seeks to strike an entire portion of Petitioners' Reply to Oppositions by Duke Energy Corp. and NRC Staff to Petitioners' Hearing Request and Petition to Intervene and Waiver Petition (Nov. 5, 2021) ("Petitioners' Reply"), on the grounds that it "exceeds the permissible scope of a reply" and "attempts to introduce a new and untimely contention" into this proceeding. Motion at 2. Contrary to Duke's assertion, Petitioners' Reply raised no new or expanded claims. Petitioners merely responded to arguments made by Duke against the admission of Petitioners' Contentions 2 and 3. The ASLB should reject Duke's ill-disguised attempt to deprive Petitioners of their rightful opportunity to defend the admissibility of their contentions.

II. FACTUAL BACKGROUND

On September 27, 2021, Petitioners submitted Hearing Request and Petition to Intervene by Beyond Nuclear and Sierra Club and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to Allow Consideration of Category 1 NEPA Issues (Sept. 27, 2021)

(“Hearing Request”). The Hearing Request was supported by an expert declaration and report by Jeffrey T. Mitman. Declaration of Jeffrey T. Mitman in Support of Beyond Nuclear and Sierra Club Hearing Request (Sept. 27, 2021); Mitman, NRC Relicensing Crisis at Oconee Nuclear Station: *Stop Duke from Sending Safety Over the Jocassee Dam* (Sept. 2021) (“Mitman Report”). Petitioners’ Contentions 2 and 3 challenged the adequacy of Duke’s Environmental Report to satisfy the National Environmental Policy Act (“NEPA”) and NRC implementing regulations, on the grounds that it failed to consider new and significant information regarding the potential for a reactor accident caused by failure of the Jocassee Dam. In support of Contentions 2 and 3, Petitioners relied on Mr. Mitman’s expert report, which evaluated the risk analyses presented and documented in Duke’s Environmental Report. Based on documents by Duke and the NRC Staff that were not considered in the Environmental Report, Mr. Mitman demonstrated that the potential for a core melt accident caused by failure of the Jocassee Dam is significantly higher than estimated in Duke’s Environmental Report.

On October 22, 2021, Duke filed Applicant’s Answer Opposing Request for Hearing, Petition to Intervene, and Petition for Waiver Submitted by Beyond Nuclear and Sierra Club (“Duke Opposition”). In opposing the admission of Contentions 2 and 3, Duke asserted that Mr. Mitman’s expert report contained “multiple clear and significant factual errors, omissions, and mischaracterizations.” Duke Opposition at 3. Duke also asserted that “clear and unequivocal factual information *in the public record* contradicts several false, misleading, and alarmist assertions by Mr. Mitman, thereby depriving Petitioners of the requisite *support* and ability to demonstrate a *genuine* dispute, as required at the contention admissibility stage.” *Id.* at 13 (emphasis in original).

As an example of Mr. Mitman’s alleged errors and mischaracterizations of the factual record, Duke faulted Mr. Mitman for failing to consider an updated probabilistic risk assessment (“PRA”) that Duke had prepared. Duke Opposition at 17. According to Duke, the updated PRA provides a “best estimate” of dam failure probability for the Jocassee Dam that is “*two orders of magnitude* lower” than Mr. Mitman’s estimate. *Id.* and n. 85 (citing D. Bowles, et al., RAC Engineers & Economists, “Initial Hazard Curve for Flooding at the Safe Shutdown Facility at Oconee Nuclear Station Resulting from a Random Failure of Jocassee Dam” (Feb. 28, 2010), PDF pages 284 to 308 of FOIA/PA No. 2012-0325 (ML15156A702) (“Bowles Document”)) (emphasis in original). *Id.*

As permitted by 10 C.F.R. § 2.309(i)(2), Petitioners replied to Duke’s Opposition. Petitioners’ Reply to Oppositions by Duke Energy Corp. and NRC Staff to Petitioners’ Hearing Request and Petition to Intervene and Waiver Petition (Nov. 5, 2021) (“Petitioners’ Reply”). Petitioners demonstrated that Duke erred in claiming that Mr. Mitman had failed to consider Duke’s updated PRA. To the contrary, “Mr. Mitman did note that Duke had claimed to update its PRA, but observed that the Environmental Report was devoid of any quantitative information, or even a reference number for a document.” Petitioners’ Reply at 17 (citing Mitman Report at 17). Petitioners also set forth the legal and policy bases for the NRC’s requirement that documents relied on in an environmental report should be identified in a reference list and publicly disclosed in conformance with the Freedom of Information Act. *Id.* at 17-18 (citing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 15 (2008) (“*Diablo Canyon*”) (noting the link between NEPA and the Freedom of Information Act (“FOIA”))). Given Duke’s complete failure to comply with these requirements, Petitioners asserted that “it is absurd for Duke to suggest that Mr. Mitman should

have reviewed information that was not identified or provided with the publication of the Environmental Report.” *Id.*

In addition, Petitioners observed that it was not clear whether Duke had submitted its PRA update to the NRC, because Duke had provided “no citation to a docketed version of an updated PRA.” Petitioners’ Reply at 18. Considering that “the NRC ultimately will be responsible for any assertions in the Supplemental GEIS that are based on representations by Duke,” Petitioners questioned why Duke was “insisting that Petitioners discuss a document that Duke claims is highly relevant to the Environmental Report but that may not even be in the hands of the NRC.” *Id.*

Petitioners also questioned the provenance and significance of the Bowles Document, which appears to be a summary document rather than a PRA, is marked as a “DRAFT,” and has no cover letter to indicate how or when it was submitted to the NRC. *Id.* at 18. As noted by Petitioners, “[o]nly by virtue of the FOIA has this summary draft document been identified by NRC or released to the public.” *Id.*

Finally, Petitioners noted that the Bowles Document directly contradicts a 2018 Staff Assessment, and thereby raises questions as to the legitimacy of both documents. *Id.* at 18-19 (comparing Bowles Document to Staff Assessment by the Office of Nuclear Reactor Regulation Related to the Focused Evaluation for Oconee Nuclear Station, Units 1, 2, And 3 as a Result of the Reevaluated Flooding Hazard Near-Term Task Force Recommendation 2.1 - Flooding (CAC NOS. MG0265, MG0266, MG0267, AND EPID L-2017-JLD-0029) (“2018 Staff Assessment”).

Now Duke seeks to strike all of these legal arguments and factual assertions by Petitioners, on the grounds that (a) they exceed the scope of Petitioners’ Contentions 2 and 3, and (b) they raise new claims without justifying the untimeliness of the claims. Duke Opposition at 2.

III. ARGUMENT

The right of a petitioner to respond to arguments opposing admission of a contention to an adjudicatory hearing is well-established as an essential requirement for a fair NRC proceeding. As the Appeal Board found in *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521 (1979) (“*Allens Creek*”), each licensing board “must fashion a fair procedure for dealing with such objections to contentions as are filed,” observing the “cardinal rule” that “each side must be heard.” *Id.* (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *United States v. Steel Tank Barge H 1651*, 272 F.Supp. 659, 659 n.1 (E.D.La. 1967); Kelley, “Audi Alteram Partem,” 9 *Natural Law Forum* 103 (1964)). And as the Licensing Board further noted in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), 14 N.R.C. 71 (1981) (“*Shoreham*”), “[i]nsofar as contentions are concerned, the intervenors must be heard in response [to opposition briefs] because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them.” *Id.* at 73.

As provided by the *Allens Creek* and *Shoreham* decisions and 10 C.F.R. § 2.309(i)(2), Petitioners’ Reply responded to Duke’s arguments that Petitioners’ Contentions 2 and 3 should be rejected for Mr. Mitman’s failure to consider relevant information cited in the Environmental Report. Contrary to Duke’s assertion, Petitioners’ Reply raised no new or expanded claims. As Duke is well aware, the purported new and independent claim Duke seeks to strike -- that Duke violated NEPA by failing to list the PRA update as a reference document (Motion at 4) -- would not be legally possible for Petitioners to make or sustain. Duke was free to withhold the PRA update from public disclosure, and free to withhold identifying information that would allow Petitioners to obtain and review it. Petitioners would have no valid legal claim to the contrary.

But Duke cannot have it both ways. Having made the choice to avoid public accountability for the contents of the PRA update, Duke waived its right to rely on the PRA update to demonstrate the adequacy of its Environmental Report to satisfy NEPA and NRC implementing regulations. *Diablo Canyon*, 67 N.R.C. at 15. By the same token, Duke waived the right to seek dismissal of Petitioners' contentions based on their failure to address the PRA update in their contentions.

At bottom, Duke's Motion is nothing more than an attempted end-run around the requirements of *Allens Creek, Shoreham*, and 10 C.F.R. § 2.309(i)(2) that Petitioners must be heard in response to opposition arguments they had no way of anticipating in advance of receiving Duke's Opposition. Petitioners had no way of knowing, for instance, that Duke would seek to impugn Mr. Mitman's credibility and the factual bases for his expert report and Petitioners' contentions by attacking Mr. Mitman for failing to discuss a PRA update for which Duke had provided absolutely no identifying information, let alone the document itself; or that Duke would criticize Mr. Mitman for failing to discuss the Bowles Document, which had no independent identifying information, was not cited as a reference document, and was buried among thousands of pages of documents released by NRC under the FOIA. As discussed in Petitioners' Reply, such an argument by Duke was "absurd," given Duke's failure to meet the NRC's requirement that NEPA documents must identify the studies on which they rely and provide access to those documents in compliance with FOIA. Petitioners' Reply at 18. Pursuant to basic NRC principles of fairness, Petitioners had the right to point out that Duke did not appear to have submitted an updated PRA to the NRC, and thus Petitioners had no way to obtain it; that Bowles Document was not a PRA at all, but a draft of a summary document; that the Bowles Document did not meet any of the NRC's requirements for a reference document in Duke's Environmental Report, including Duke's failure to cite it as a reference document,

provide an ADAMS accession number, or demonstrate that the Bowles Document had been formally submitted to the NRC; and that the Bowles Document has questionable value because it contradicted a 2018 Staff Assessment.

No case cited by Duke holds otherwise. In *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 433, 439 (2006), the Commission ruled that a petitioner could not use a reply to make new claims that had not been raised in the petitioner's original contention. Similarly, in *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 439 (2006), the Commission refused to allow a petitioner to use a reply to raise "new arguments or new legal theories that opposing parties have not had an opportunity to address." In neither of these decisions did the Commission address the question raised by Duke's Motion, *i.e.*, whether the ASLB may prevent a petitioner from responding to arguments, appearing for the first time in opposition to the admission of contentions, that the Petitioners' initial claims should not be heard. Based on the fundamental principles of fairness set forth in *Allens Creek* and *Shoreham*, the answer must be a resounding "No."

IV. CONCLUSION

For the foregoing reasons, the ASLB should deny Duke's Motion.

Respectfully submitted,

 /signed electronically by/

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CERTIFICATE OF SERVICE

I certify that on December 1, 2021, I posted on the NRC’s Electronic Information Exchange
PETITIONERS’ RESPONSE TO DUKE ENERGY CAROLINAS LLC’S MOTION TO
STRIKE PORTION OF PETITIONERS’ REPLY.

/signed electronically by/
Diane Curran