

September 26, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
NUCLEAR MANAGEMENT)	Docket No. 50-255-LR
COMPANY, LLC)	
)	ASLBP No. 05-842-03-LR
(Palisades Nuclear Plant))	

NRC STAFF MOTION TO STRIKE PETITIONERS'
COMBINED REPLY TO NRC STAFF AND NMC ANSWERS
TO PETITION TO INTERVENE AND REQUEST FOR HEARING

INTRODUCTION

On September 16, 2005, the Petitioners in this matter filed Petitioner's Combined Reply to NRC Staff and Nuclear Management Company Answers (Petitioners' Reply). Pursuant to 10 C.F.R. § 2.323, the Nuclear Regulatory Commission Staff (Staff) herein files a motion to strike the Petitioner's reply, in whole or in part, because it purports to raise issues that were not encompassed in its original petition.

BACKGROUND

By letter dated March 22, 2005, Nuclear Management Company, LLC (NMC) submitted an application for renewal of Operating License No. DPR-20 for the Palisades Nuclear Plant for an additional 20 years.¹ The current operating license for the Palisades plant expires March 24, 2011. On August 8, 2005, Petitioners jointly filed a Request for Hearing and Petition to Intervene (Petition) on NMC's license renewal application.² On September 2, 2005, the Staff

¹ See Letter from Daniel J. Malone, Site Vice President, Palisades Nuclear Plant, [NMC], to U.S. NRC (Mar. 2, 2005) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML050940434).

² See Request for Hearing and Petition to Intervene, August 8, 2005.

and NMC filed separate responses to the Petition.³ On September 16, 2005, pursuant to the Board's September 6, 2005 Order (Regarding Requests to Reschedule), the Petitioners filed the Petitioners' Reply.⁴ For the reasons discussed below, the Staff hereby moves to strike Petitioners' Reply, except to the extent that it withdraws Contentions 5, 6 and 8-11.

DISCUSSION

A. The Reply is Improper Under 10 C.F.R. § 2.309(h)(2).

The Petitioners' reply is improper on its face because it improperly attempts to expand the scope of the arguments set forth in the original petition. It also improperly provides bases and documents that could have been submitted in its original petition and are, therefore, impermissibly late without good cause. To the extent that the Petitioners' Reply introduces new arguments and new support, it should be stricken from the record in this proceeding.

The permissible scope of a reply such as the one filed by the Petitioners was explicitly set forth by the Commission in promulgating the recent revisions to the NRC's rules of practice when it stated:

Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or the NRC staff answer. . . .

Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,203 (January 14, 2004).

Contrary to the Commission's clear direction, the Petitioners have attempted to use the opportunity to reply as a vehicle to introduce new arguments and new support that should originally have been raised in its Petition. In fact, other than some general statements that the

³ See NRC Staff Answer Opposing Petition to Intervene and Request for Hearing, September 2, 2005; Nuclear Management Company's Answer to the August 8, 2005 Request for Hearing and Petition to Intervene, September 2, 2005.

⁴ In the reply, Petitioners withdrew Contentions 5, 6, and 8-11.

original petition was sufficient, the entire reply consists of new arguments and new support, and should be disregarded by the Board. *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004), *aff'd* CLI-04-25, 60 NRC 223, *reconsideration den'd* CLI-04-35, 60 NRC 619.

In *LES*, the Licensing Board refused to consider information in support of contentions that was first submitted in a reply pleading, finding that the reply filings “essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in [10 C.F.R.] section 2.309(c), (f)(2), cannot be considered in determining the admissibility of their contentions.” *LES*, LBP-04-14, 60 NRC at 58. The Board referred its ruling to the Commission, which affirmed, stating:

[W]e concur with the Board that the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs. . . . As the Commission has stressed, our contention admissibility and timeliness requirements “demand a level of discipline and preparedness on the part of petitioners,” who must examine the publicly available material and set forth their claims and the support for their claims at the outset. . . . 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.

LES, CLI-04-25, 60 NRC at 224-25 (internal footnotes omitted). When asked by the petitioners to reconsider its decision on the grounds that the reply findings merely provided additional bases for the contentions, the Commission declined, stating:

“Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements,” as the NRC Staff explains, “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. We believe that the 60-day period provided under 10 C.F.R. § 309(b)(3) for filing hearing requests, petitions, and

contentions is “more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions.”

LES, CLI-04-35, 60 NRC at 622-23 (footnotes omitted).

Evaluated against this background, it is clear that the Petitioners’ attempt to render the contentions admissible by supplementing them in the reply must be rejected. Although the Petitioners’ Reply states that NMC and the Staff’s objections to the original petition are not well taken (see *e.g.*, Petitioners Reply at 24-25), it does not address the objections made by the Staff and NMC, but instead cites information that could have been addressed in the original petition, but was not. The information was readily available when the original petition was filed, but the petitioners offer no explanation why it was not included in the original petition.

It is not until the reply that the Petitioners attempt to supply support for the contentions, in violation of the Commission’s clear direction in the *LES* case. See CLI-04-25, 60 NRC at 224-25; CLI-04-35, 60 NRC at 622-23. The deficiencies in the original petition simply cannot be cured by the reply. Petitioners’ Reply does not address responders’ arguments, but rather adds new arguments and support for the inadequate contentions. Therefore, the Petitioners’ Reply should be stricken.

B. The Petitioners Rely on an Outdated, Superseded Standard for Admission of Contentions

The Petitioners rely on a standard for admission of contentions that has been superseded by case law and by at least two revisions of the regulations. See Petitioners’ Reply at 9, 23, 42-43. The relevant standard for admission of contentions is contained in 10 C.F.R. § 2.309(f), which was codified in 2004 and supersedes prior regulations and inconsistent case law. That regulation requires that a contention:

- i. Provide a specific statement of law or fact to be raised or controverted;

- ii. Provide a brief explanation of the basis for the contention;
- iii. Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- iv. Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- v. Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- vi. Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). The provisions of § 2.309 “incorporate the longstanding contention support requirements of former § 2.714—no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met.” *Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004). Thus, statements by Petitioners to the contrary and reliance on cases superceded by the rule change are incorrect.

Application of the regulation has been further developed in case law. *See LES, LBP-04-14*, 60 NRC at 54-57. *See also Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station) LBP-04-28, 60 NRC 548, 554-558 (2004). So, for example, a contention that challenges a Commission rule or regulation, or that seeks to impose stricter requirements than the regulations, is inadmissible. *LES, LBP-04-14*, 60 NRC at 54-55. Contentions that are outside the scope of the proceeding are inadmissible. *Id.* at 55. Contentions that do not present the factual information and expert opinions needed for support are inadmissible. *Id.* “[N]either

mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention.” *Id.* (Citations omitted). Contentions must assert an issue of law or fact that is material to the proceeding. *Id.* at 56. Finally, a contention must directly controvert the application. *Id.* As explained in the Staff’s September 2, 2005 response in opposition to the original Petition, the contentions as set forth in the Petition fail to meet any of the criteria cited above.

The deficiencies in the Petition cannot be cured in the reply. Therefore, the Petitioners’ Reply is improper on its face and should be stricken.

CERTIFICATION OF COUNSEL

On September 26, 2005, pursuant to 10 C.F.R. § 2.323(b), I spoke to Terry Lodge, counsel for Petitioners, in an effort to resolve the issues raised in this motion. The effort to resolve the issues was unsuccessful.

CONCLUSION

For the foregoing reasons, Petitioners’ Reply should be stricken, except to the extent that it withdraws contentions 5, 6 and 8-11.

Respectfully submitted,

/RA/

Susan Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of September, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION TO STRIKE PETITIONERS' COMBINED REPLY TO NRC STAFF AND NMC ANSWERS TO PETITION TO INTERVENE AND REQUEST FOR HEARING," in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, by U.S. mail, first class, as indicated by an asterisk, with copies by electronic mail, or by U.S. mail, first class, as indicated by double asterisk, this 26th day of September, 2005:

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