

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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In the Matter of:

DUKE ENERGY CAROLINAS, LLC

(Oconee Nuclear Station, Units 1, 2 and 3)

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)  
) Docket Nos. 50-269-SLR  
) 50-270-SLR and  
) 50-287-SLR  
)

) November 15, 2021  
)

**DUKE ENERGY CAROLINAS, LLC’S MOTION TO STRIKE PORTIONS OF THE  
REPLY FILED BY BEYOND NUCLEAR AND SIERRA CLUB**

**I. INTRODUCTION**

In accordance with 10 C.F.R. § 2.323(a),<sup>1</sup> and the Atomic Safety and Licensing Board’s (“Board”) Order of October 13, 2021,<sup>2</sup> Duke Energy Carolinas, LLC (“Duke”) moves to strike portions of the Reply filed on November 5, 2021, by Beyond Nuclear and Sierra Club (collectively, “Petitioners”)<sup>3</sup> related to their September 27, 2021 Petition to Intervene and Request for a Hearing (“Petition”)<sup>4</sup> and the Answers thereto filed by Duke and the U.S. Nuclear Regulatory Commission (“NRC”) Staff.<sup>5</sup>

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<sup>1</sup> Pursuant to 10 C.F.R. § 2.323(b), Duke counsel certifies that a sincere effort was made to contact the other participants in the proceeding and resolve the issues raised in this motion, and those efforts to resolve the issues have been unsuccessful. Petitioners declined to withdraw Section II.B.4 of the Reply and oppose the motion. The NRC Staff does not oppose the filing of this motion and reserves the right to respond.

<sup>2</sup> Licensing Board Memorandum and Order (Initial Prehearing Order) at 5 (Oct. 13, 2021) (ML21286A586).

<sup>3</sup> 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) (ML21309A774) (“Reply”).

<sup>4</sup> 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), 51.53(c)(3)(ii)(L), 51.71(d), 51.95(c)(1), and 10 C.F.R. Part 51 Subpart A, Appendix B, Table B-1 to Allow Consideration of Category 1 NEPA Issues (Sept. 27, 2021) (Package ML21270A249) (“Petition”).

<sup>5</sup> Applicant’s Answer Opposing Request for Hearing, Petition to Intervene, and Petition for Waiver Submitted by Beyond Nuclear and Sierra Club (Oct. 22, 2021) (ML21295A718) (“Duke Answer”); NRC Staff’s Answer Opposing Beyond Nuclear and the Sierra Club’s Hearing Request (Oct. 22, 2021) (ML21295A755).

At the outset of this proceeding, Petitioners unambiguously framed Proposed Contention 2 in the Petition as a claim that Duke’s Environmental Report (“ER”) failed to consider certain new and significant information (“NSI”) as required by 10 C.F.R. § 51.53(c)(iv). In contrast, the discussion of Proposed Contention 2 in Section II.B.4 of the Reply raises—for the first time—an entirely new theory that the ER is deficient because it “provides no citation to a docketed version of an updated [Probabilistic Risk Assessment] PRA,” as allegedly required by “basic NEPA [National Environmental Policy Act] requirements” and the “Freedom of Information Act” (“FOIA”).<sup>6</sup> As explained below, this new claim of omission, based on a new legal theory alleging noncompliance with different legal requirements, exceeds the permissible scope of a reply and impermissibly attempts to introduce a new and untimely contention into the proceeding without first satisfying the late-filing criteria in 10 C.F.R. § 2.309(c). Accordingly, Section II.B.4 of the Reply should be stricken.<sup>7</sup>

## **II. LEGAL STANDARDS GOVERNING THE SCOPE OF A REPLY AND NEW OR AMENDED CONTENTIONS OUT-OF-TIME**

“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.”<sup>8</sup> Moreover, “[t]he Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.”<sup>9</sup> Rather, NRC

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<sup>6</sup> Reply at 18.

<sup>7</sup> This includes the summary of Section II.B.4 in the sentence at the bottom of page 7 and top of page 8 of the Reply, including footnote 4.

<sup>8</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>9</sup> *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

contention admissibility and timeliness requirements “demand a level of discipline and preparedness on the part of petitioners, who must . . . set forth their claims . . . at the outset” of the proceeding.<sup>10</sup> As the Commission has explained, “[t]here simply would be ‘no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements’ and add new bases or new issues that ‘simply did not occur to [them] at the outset.’”<sup>11</sup>

The Commission demands adherence to this requirement to “avoid unnecessary delays and increase the efficiency of NRC adjudication,”<sup>12</sup> because answering parties are “entitled to be told at the outset, *with clarity and precision*, what arguments are being advanced.”<sup>13</sup> Thus, the permissible scope of a reply includes only information that (1) “legitimately amplifie[s]” arguments in the original petition,<sup>14</sup> or (2) “focus[es] narrowly on the legal or factual arguments first . . . raised in the answers [thereto].”<sup>15</sup> Ignoring these principles would render the Commission’s intentionally-restrictive pleading standard meaningless—as petitioners could simply raise new contentions after the filing deadline, without the need to satisfy the requirements in 10 C.F.R. § 2.309(c) for new or amended contentions filed after the initial deadline for hearing requests and petitions to intervene.<sup>16</sup> Among other things, those requirements mandate a demonstration by the petitioner as to why the new claims could not have been raised earlier in the proceeding.

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<sup>10</sup> *La. Energy Servs., LP* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (internal quotation marks omitted), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> *LES*, CLI-04-35, 60 NRC at 622-23.

<sup>13</sup> *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975) (emphasis added).

<sup>14</sup> *LES*, CLI-04-25, 60 NRC at 224-25.

<sup>15</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>16</sup> *See Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527–28 (2007).

**III. SECTION II.B.4 OF THE REPLY EXCEEDS THE PERMISSIBLE SCOPE OF A REPLY AND FAILS TO SATISFY 10 C.F.R. § 2.309(c)**

Proposed Contention 2—captioned “Failure to Consider New and Significant Information Regarding Significant Impacts of Reactor Accidents Caused by Failure of Jocassee Dam”—argued that the ER fails to consider certain NSI, as required by 10 C.F.R. § 51.53(c)(3)(iv).<sup>17</sup> Specifically, Petitioners claimed that Duke’s ER allegedly does not address two items: (1) unspecified Duke “risk analyses,” and (2) the 2011 NRC Evaluation.<sup>18</sup> Now, for the first time in their Reply, Petitioners assert that Duke has “violated basic NEPA requirements for documentation and transparency by failing to document or even identify a purported PRA update.”<sup>19</sup> In support of their new argument, Petitioners now raise several different assertions in the context of Proposed Contention 2 related to purported “documentation” and “citation” deficiencies in the ER. For example, Petitioners claim that Duke failed to supply a “reference list” or a “citation to a docketed version of an updated PRA” as part of its ER, as allegedly required by “the public disclosure requirements of NEPA” and FOIA.<sup>20</sup> However, this line of argument exceeds the permissible scope of a reply pleading and does not otherwise satisfy the requirements for a new or amended contention out-of-time.

1. Petitioners’ New Arguments Are Not a “Legitimate Amplification” of Arguments Advanced in the Petition

First, Petitioners’ fresh challenges to the “documentation” and “citations” in the ER exceed the permissible scope of a reply because Petitioners raised none of these arguments in their Petition. Moreover, these claims cannot be fairly characterized as “legitimate

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<sup>17</sup> Petition at 13.

<sup>18</sup> *Id.* at 14.

<sup>19</sup> Reply at 17.

<sup>20</sup> *Id.* (citations omitted).

amplification” of Petitioners’ original arguments. In the Petition, Proposed Contention 2 proffered a challenge based on the NSI requirements in 10 C.F.R. § 51.53(c)(iv). In contrast, Petitioners’ new “documentation” and “citation” arguments cite (non-specific portions of) NEPA and FOIA, with no apparent connection to NSI or 10 C.F.R. § 51.53(c)(iv). Petitioners attempt to connect these arguments to a statement in the Mitman Declaration (but not mentioned in the Petition or Contention 2) in which Mr. Mitman observed that the ER did not specify the value of the “change in the external events CDF” or cite corresponding references.<sup>21</sup> But Mr. Mitman’s passing *factual* observation offered no suggestion that such information (much less, the entire “updated PRA”) was *legally required* to be presented in the ER by NEPA or FOIA—or any other requirement—as Petitioners now claim. And Petitioners certainly did not cite or mention Mr. Mitman’s brief factual observation in their Petition, much less advance any legal argument or explanation of how it purportedly connects to their NSI-based contentions. That is not a “legitimate amplification.” It is a wholly new legal theory that Petitioners did not raise at the outset of this proceeding.

2. Petitioners’ New Arguments Are Not “Focused Narrowly” on Arguments First Raised in the Answers

In the original Petition, Petitioners claimed that the ER’s consideration of hypothetical severe accidents initiated by external flooding events “relied on the same probability estimates [Duke] used in its first license renewal application in 1998.”<sup>22</sup> But, as Duke explained in its Answer, that statement is untrue.<sup>23</sup> The ER plainly stated that Duke’s NSI review considered external flood PRA models that were developed “*since* the first license renewal.”<sup>24</sup>

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<sup>21</sup> Reply at 17 (citing Mitman Declaration at 17).

<sup>22</sup> Petition at 15 n.26 (citing Mitman Decl. at 21).

<sup>23</sup> Duke Answer at 18.

<sup>24</sup> ER at 4-77.

As a practical matter, Duke noted that Petitioners’ expert, Mr. Mitman, should have been aware of that fact because the February 28, 2010 version of certain inputs<sup>25</sup> to Duke’s external flood PRA model (the “RAC Engineering Study,” issued well after the 1998 initial license renewal) were available in a document that Mr. Mitman, himself, cited several times.<sup>26</sup> Duke also highlighted Mr. Mitman’s silence regarding the significant disparity between the Jocassee-specific value presented in the RAC Engineering Study versus the generic bounding value used by Mr. Mitman in his purported “best estimate.”<sup>27</sup> To be sure, Duke’s Answer did not fault the proposed contentions<sup>28</sup> for failing to engage with any portion of the “updated PRA” that is not otherwise presented in the ER.<sup>29</sup> Rather, this “Background” discussion in Duke’s Answer noted Mr. Mitman’s failure to address one specifically-identified and publicly-available document—the RAC Engineering Study—as a prudential matter, given his awareness of the information and its relevance to his claims.<sup>30</sup>

In the Reply, Petitioners offer no response to the error identified by Duke; and they offer no explanation as to why Mr. Mitman did not address the Jocassee-specific (i.e., non-generic) PRA input of which he was aware. Instead, Petitioners pivot to a new challenge, demanding disclosure of the entire “updated PRA,” based on a previously-undisclosed legal theory that has

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<sup>25</sup> Petitioners remark that the RAC Engineering Report is “not a PRA at all.” Reply at 18. That is correct. It is an assessment of “dam failure frequency specific to the Jocassee dam,” *see* Duke Answer at 17, which is an input to PRA, *see id.* at 16 n.75 (discussing initiating event frequency).

<sup>26</sup> Duke Answer at 17-18 n.85.

<sup>27</sup> *Id.* at 17.

<sup>28</sup> The contentions fault the ER for allegedly failing to consider certain purported NSI, whereas “Petitioners do not explicitly claim that Mr. Mitman’s attempted calculation of ‘best estimate’ CDF constitutes NSI.” Duke Answer at 37 n.173.

<sup>29</sup> Duke squarely asserted that all information required by Part 51 as to the Severe Accidents issue is presented or incorporated by reference in the ER. *See* Duke Answer at 9-10.

<sup>30</sup> *Cf. Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 532 (1978) (describing the “manifest and iron-clad obligation” to disclose to the Board any unfavorable facts that “cast a quite different light upon the substance of arguments being advanced” in an adjudicatory proceeding).

not been briefed by the other participants. Because Section II.B.4 of the Reply sidesteps Duke’s assertions, it cannot be fairly viewed as being focused—much less, “focused *narrowly*”<sup>31</sup>—on Duke’s Answer.

3. Petitioners’ New Arguments Do Not Satisfy the Requirements in 10 C.F.R. § 2.309(c) for New or Amended Contentions Out-of-Time

The Commission’s regulations specify that new or amended contentions out-of-time cannot be submitted without leave of the Board, which must be requested via motion.<sup>32</sup> Moreover, even when such a motion is filed—which Petitioners have not done here—proposed new or amended contentions out-of-time “*will not* be entertained absent a determination by the presiding officer that a participant has demonstrated good cause.”<sup>33</sup> Doing so requires, among other things, a demonstration by the petitioner that the information on which the new or amended contention is based “was not previously available.”<sup>34</sup> Petitioners here offer no showing that the new arguments raised in Section II.B.4 of the Reply meet that requirement, nor do they offer any explanation as to why they could not have been raised at the outset of the proceeding. And as a practical matter, the new arguments challenge the ER, which was “previously available” and has been for many months.

#### IV. CONCLUSION

Section II.B.4 of the Reply neither legitimately amplifies arguments in the original Petition, nor focuses narrowly on legal arguments first raised in an answer, nor satisfies the

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<sup>31</sup> *Palisades*, CLI-06-17, 63 NRC at 732 (emphasis added).

<sup>32</sup> 10 C.F.R. § 2.309(c).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

requirements in 10 C.F.R. § 2.309(c). Accordingly, the appropriate remedy is to strike the untimely arguments in Section II.B.4 of the Reply and references thereto.<sup>35</sup>

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.  
this 15th day of November 2021

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<sup>35</sup> This includes the summary of Section II.B.4 in the sentence at the bottom of page 7 and top of page 8 of the Reply, including footnote 4.



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November 15, 2021

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