

January 17, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
EXELON GENERATION COMPANY, LLC) 50-352-LR/ 50-353-LR
)
(Limerick Generating Station, Units 1 and 2))
)

NRC STAFF'S MOTION TO STRIKE IMPERMISSIBLE NEW CLAIMS IN NATURAL
RESOURCES DEFENSE COUNCIL'S REPLY BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the NRC Staff submits this motion to strike portions of the Natural Resources Defense Council's ("NRDC") "Combined Reply to Exelon and NRC Staff Answers to Petition to Intervene," ("Reply") filed on January 6, 2012.¹ NRDC filed the Reply in response to answers filed by the NRC Staff ("Staff Answer")² and Exelon ("Applicant Answer") in this proceeding.³ NRDC's Reply impermissibly expands the scope of the claims in its Petition to Intervene ("Petition")⁴ and in the accompanying Declaration of Christopher E. Paine ("Paine Declaration").⁵ Specifically, NRDC attempts to add additional factual bases to support

¹ Natural Resources Defense Council ("NRDC") Combined Reply to Exelon and NRC Staff Answers to Petition to Intervene (Jan. 6, 2012) (ADAMS Accession No. ML12006A224).

² NRC Staff's Answer to Natural Resource Defense Council Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011) (ADAMS Accession No. ML11355A174).

³ Exelon's Answer Opposing NRDC's Petition to Intervene (Dec. 20, 2011) (ADAMS Accession No. ML11354A451).

⁴ Natural Resources Defense Council Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) (ADAMS Accession No. ML11326A319).

⁵ Declarations of Thomas B. Cochran, Ph.D., Matthew G. McKinzie, Ph.D. and Christopher J. Weaver, Ph.D., on Behalf of the Natural Resources Defense Council (Nov. 22, 2011) (ADAMS Accession No. ML11326A322).

Contention 4-E, which challenged the Applicant's treatment of the No-action alternative in its Environmental Report ("ER").

Under Commission precedent, NRDC may not use its reply to raise new arguments, new contention bases, or new issues in an attempt to cure its defective petition. Rather, new bases for a contention must meet the normal Commission standards for filing a new, untimely, or amended contention. But NRDC also fails to address or meet those standards for any of its new claims. Accordingly, the Board should strike or not consider the new claims or bases in NRDC's Reply. Moreover, NRDC has not provided any factual support or expert testimony to support these untimely bases for Contention 4-E. As a result, even if the Board considered the additional bases for Contention 4-E, they would not render Contention 4-E admissible.

DISCUSSION

I. Legal Standards for Replies

The Commission has clearly stated that a reply to an intervention petition answer may not raise new arguments, new contention bases, or new issues in an attempt to cure a defective petition. See *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); *Nuclear Mgmt. Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). The Commission requires strict adherence to contention admissibility standards and demands discipline and preparedness on the part of petitioners. *LES*, CLI-04-25, 60 NRC at 224-225.

Importantly, contentions must be based on documents or other information available at the time the petition is filed. 10 C.F.R. § 2.309(f)(2). Therefore, untimely attempts to amend a defective, original petition must be rejected if they fail to satisfy the late-filing factors in 10 C.F.R. §§ 2.309(c), (f)(2). See *Palisades*, CLI-06-17, 63 NRC at 732. A practice that would allow petitioners to use "reply briefs to provide, for the first time, the necessary threshold support for contentions . . . would effectively bypass and eviscerate [the Commission's] rules governing timely filing, contention amendment, and submission of late-filed contentions." *Louisiana*

Energy Services, LP (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

Further, raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Palisades*, CLI-06-17, 63 NRC at 732.

A petitioner may not use a reply to reinvigorate a thinly supported contention. *LES*, CLI-04-25, 60 NRC at 224. Nor may a petitioner “initially file vague, unsupported, and generalized allegations and simply recast, support or cure them later.” *LES*, CLI-04-35, 60 NRC at 622. Although petitioners are not required “to prove their case, or to provide an exhaustive list of possible bases,” they are required to provide “sufficient alleged factual or legal bases to support the contention, and to do so at the outset.” *Id.* at 623; see also *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC 231, 237 n.27 (2008). In applying these standards, Boards have struck, or declined to consider, new information and argument offered in a reply. *E.g. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198-199 (2006); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LPB-07-04, 65 NRC 281, 301-302 (2007). Likewise, this Board should decline to consider or strike the new claims made in NRDC’s Reply that provide new bases or support for Contention 4-E and do not address the late filing requirements of 10 C.F.R. §§ 2.309(c), (f)(2).

In addition, “the Commission will not accept the filing of a vague, unparticularized [contention], unsupported by alleged fact or expert opinion and documentary support.” *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 414 (2007) (quoting *Port Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000)). Put another way, “[g]eneral assertions or conclusions will not suffice.” *Id.* Thus, “[a] petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, [or] no substantive affidavits.’” *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003). NRDC has not provided any expert or other factual support for the additional bases the Reply

advances in support of Contention 4-E. Consequently, even if the Board considered those untimely additional bases, Contention 4-E is still inadmissible because NRDC has not provided a sufficient factual basis.

II. NRDC Impermissibly Uses the Reply Brief to Provide New Support for Contention 4-E

NRDC's Reply attempts to add new bases for Contention 4-E beyond those contained in its initial Petition and the Paine Declaration. NRDC's Petition explicitly stated that Contention 4-E was a "contention of omission" (Petition at 31), but alleged that the Applicant's ER "fails to adequately consider the no action alternative." Petition at 23-24. As presented in the Petition, Contention 4-E claimed only that the Applicant improperly limited or narrowed its discussion of the No-action alternative, and that the Applicant's ER should include "the expected growth in demand side management and renewable energy sources." Petition at 23-24. The Paine Declaration, supporting Contention 4-E, only substantively stated that the ER should include "all forms of Demand Side Management (DSM), waste heat co-generation, combined heat and power, and distributed renewable energy resources, in addition to the 'single, discrete electric generation sources' reviewed by the Applicant as reasonable alternatives." Paine Declaration at 4. This passing reference to these four options is the only support that NRDC provided for alleging what analysis is missing from the Application.

The Staff's Answer noted that NRDC's Contention 4-E and the Paine Declaration provided no support for these assertions to show why the Applicant should include these undefined and unspecified energy options. See Staff Answer at 49-50. NRDC's Reply introduces several new claims and bases that were not present in its initial Petition in an effort to augment the conclusory and perfunctory support that it initially provided for Contention 4-E. But, NRDC failed to provide these bases at the outset, and may not "initially file vague, unsupported, and generalized allegations and simply recast, support or cure them later." *LES*, CLI-04-35, 60 NRC at 622.

The NRC Staff objects to the Board's consideration of these new bases and supports to

the extent that these were not raised in NRDC's initial contention or supporting declarations. Allowing NRDC to raise such new claims in a reply unfairly deprives the other participants of an opportunity to rebut the claims (*Palisades*, CLI-06-17, 63 NRC at 732) and frustrates the Commission's rules on timely filing. The following section lists statements by NRDC in its Reply that provide additional bases to support Contention 4-E beyond what NRDC alleged in its initial Petition and Paine Declaration and therefore should be stricken or not considered by the Board.

LIST OF STATEMENTS TO BE STRICKEN OR NOT CONSIDERED

1. NRDC's Reply asserts that "a wide portfolio of *decentralized and distributed* generation and DSM resources" "are not 'hypothetical' analytical constructs, and actually exist today as part of the electricity resources in the PJM Interconnection's wholesale power market. They are reasonably assessed as capable of playing a larger role in the future." Reply at 56. This statement impermissibly attempts to add support for Mr. Paine's allegation that the Applicant must analyze the four energy options listed in his Declaration (distributed renewal, all forms of DSM, heat transfer, and process heat) (Paine Declaration at 4). The Paine Declaration initially put these options forth as an undefined, unsupported list with no evidence of viability or utilization in the PJM. See Staff Answer at 49-50. The Staff's Answer stated that NRDC provided no support to show that these four options were viable. Staff Answer at 49-50. NRDC impermissibly produces this new support for Contention 4-E in response to the identified deficiency. See Reply at 56.
2. NRDC's Reply claims that the Applicant's analysis of the No-action alternative will need to 1) "comply with existing PJM-area state renewable energy mandates"; 2) take into account "varying plausible assumptions regarding the evolution of natural gas prices and other relevant factors, such as technological change and power imports from outside the region"; and 3) consider any "response to provision or removal of federal and state incentives, such as investment and production tax credits for certain clean energy

technologies.” Reply at 62-63. This impermissibly attempts to add support to NRDC’s previous, otherwise-unsupported claims that the Applicant should make a “projection of the likely portfolio of PJM electricity system resources available in the region served by LGS.” Paine Declaration at 4. None of these three assertions are in either the Petition or the Paine Declaration. Thus, NRDC adds three completely new bases to this claim in its Reply. Reply at 62.

3. NRDC’s Reply alleges that the “cross-referenced reasonable alternatives” in the ER are “in fact, patently *unreasonable* and plainly violate NRC Staff determinations in the GEIS that a ‘reasonable set of alternatives should be limited to . . . electric generation sources that are *technically feasible and commercially viable*” and “*those alternatives that are reasonable for the region.*” Reply at 58-59. NRDC states that “Exelon’s analysis repeatedly violates these criteria.” *Id.* at 59. But NRDC did not raise any of these claims in its Petition or in the Paine Declaration. Instead, NRDC impermissibly attempts to add claims in response to the Staff’s statement that NRDC failed to support its claims with options that were commercially feasible or technically viable options. Staff Answer at 49-50.
4. NRDC’s Reply newly challenges Exelon’s analysis of solar power using PV generation and claims specifically that Exelon’s analysis of PV solar is a “sham” and “is utterly implausible.” Reply at 59. NRDC adds that “[t]his highly implausible rendition of the PV solar alternative is not ‘remotely reasonable for the region’ nor would it be ‘commercially viable,’ now or in the future because the land requirements and cost alone, in the densely populated Mid-Atlantic region served by LGS, rule it out.” *Id.* at 60. This substantive claim is completely new, as NRDC’s Petition and declarations did not allege that the Applicant’s analysis was inadequate for these reasons.
5. NRDC’s Reply states that “Concentrating Solar Power (CSP) deployment . . . is not merely infeasible for the region and commercially non-viable, but *technically infeasible*

as well – yet another violation of the GEIS criteria.” Reply at 60. But, this claim cannot be derived from any statement NRDC made in its Petition or supporting declarations.

NRDC adds further that “Exelon offers no basis to believe that any PJM member utility or independent merchant power generator has proposed or would propose deployment of the massive CSP plant described in the ER, given the comparatively low levels of direct normal solar radiation available in the [region of interest (“ROI”)] served by the PJM.” *Id.*

Once again, nowhere did NRDC raise this claim in its Petition or in Mr. Paine’s Declaration.

6. NRDC also claims for the first time that “by postulating the deployment of massive 98,900 – 154,000 acre solar plants on land cleared for this purpose within the ROI for Limerick, it is the ER that violates the ‘technically infeasible’ and ‘commercially viable’ criteria for selection of reasonable alternatives set forth in the GEIS.” Reply at 66. NRDC never before alleged that the Applicant’s analysis of solar energy alternatives was technically infeasible or commercially unviable.
7. NRDC puts forth new claims regarding the viability of the Applicant’s analysis of specific combinations of power resources. NRDC alleges now that “*various combinations of these resources, with or without power imports, could plausibly evolve by 2024 to effectively ‘replace’ the energy services - not necessarily the ‘net base-load capacity’ – now provided by LGS, but the ER omits analysis of this scenario, in clear contravention of the GEIS, which states, ‘energy conservation and power imports are possible consequences of the no-action alternative.’*” Reply at 56. NRDC never before put forth this support previously.
8. NRDC now states in its Reply, without any expert support, that “[t]he DSM energy saving scenario is no less reasonable than the massive but wildly unrealistic centralized renewable energy schemes concocted by Exelon for the sole purpose of performing pro-forma NEPA analyses.” Reply at 57. Initially, NRDC only claimed that the Applicant

must analyze “all forms of Demand Side Management.” Paine Declaration at 4. The NRC Staff pointed out in its Answer that NRDC did not identify any dispute with the Applicant’s existing analyses of DSM. Staff Answer at 49-50. As a result, this allegation in the Reply regarding the substance of the Applicant’s DSM energy analysis is completely new.

9. NRDC also presents a new allegation that “power plant alternatives are to be considered ‘possible’ actions, only if, per the GEIS, they are also ‘technically feasible,’ ‘commercially viable,’ and ‘reasonable for the region,’ which as we have noted, several of them are not.” Reply at 67. NRDC did not “note” this until the Reply and never before claimed that the Applicant’s analyses were deficient for these reasons.
10. NRDC’s Reply also includes new allegations that the Applicant’s analysis is inadequate because it rests on “hypothetical scenarios” and that it must, instead, “reflect the actual environmental impacts of existing, planned, proposed, and ‘reasonably foreseeable’ PJM electricity resources that would, or reasonably could, be made available by 2024 in the event that the LGS operating license is not renewed.” Reply at 61. NRDC further claims, for the first time, that the Applicant’s analysis is inadequate because neither Exelon nor another member of the PJM interconnection has “current plans” to build any of the “hypothetical, impractical, and uneconomic” alternatives. *Id.* Similarly, NRDC later newly claims that “several of the ‘conceivable alternatives’ examined by the Applicant are ... so ‘hypothetical’ as to be utterly implausible and therefore not ‘feasible’ and indeed, ‘speculative’.” Reply at 65. NRDC never before alleged that the Applicant’s analysis was inadequate because any of the alternatives put forth were implausible, hypothetical, infeasible, or speculative. None of these arguments were raised in the Petition or in the Paine Declaration. In fact, NRDC failed to specifically challenge *any* of the Applicant’s existing analyses other than to claim that they were generally inadequate, as the NRC Staff pointed out in its Answer. See Staff Answer at 41-42.

11. NRDC also puts forth several new claims regarding the Applicant's analysis of battery storage. First, NRDC alleges that the Applicant's analysis "obscure[s] and distort[s] the view of related, environmentally protective energy storage technologies" and refers to the Applicant's analysis of battery storage. Reply at 61-62. Second, NRDC adds the claim that these systems are "being designed to support 'dispersed' and modular application of solar and wind technologies," which it never stated before in any form or fashion. Reply at 62. Third, NRDC claims that "Exelon provides no analysis of the availability or likelihood that such systems can or will be deployed within the area served by PJM." Reply at 62. NRDC never raised any claims before regarding battery storage or whether it was properly analyzed.

III. NRDC May Not Use Its Reply Brief to Raise New Claims or Provide New Support for Contention 4-E

The NRC Staff identified in its Answer that NRDC's Contention 4-E lacked an adequate basis and did not establish a material dispute with the Application. Staff Answer at 45-46. NRDC cannot now come back and create support for its Contention to rectify these problems, which, as discussed above, is exactly what the Reply attempts to do. NRDC impermissibly uses its Reply to belatedly reinvigorate a thinly supported contention. *LES*, CLI-04-25, 60 NRC at 224. NRDC may not "initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later." *LES*, CLI-04-35, 60 NRC at 622. Although NRDC is not required "to prove their case, or to provide an exhaustive list of possible bases," they are required to provide "sufficient alleged factual or legal bases to support the contention, and to do so at the outset." *Id.* at 623.; *see also Millstone*, CLI-08-17, 68 NRC at 237 n.27. NRDC provided only conclusory statements for Contention 4-E in its Petition and Paine Declaration, failed to provide the requisite expert support, and simply did not identify any material dispute with the Applicant's analysis in the ER. *See* Staff Answer at 45-46. NRDC cannot now attempt to use its Reply to identify material disputes and support its conclusory statements with new

information.

Notably, even if the Board considered all of the new statements identified above, none of them are adequately supported by *any expert or other support*. For example, NRDC provides no expert or factual support, including from Mr. Paine, for its assertions that PV solar or Concentrating Solar Power is commercially unviable and technically infeasible. See Reply at 59-60. Thus, even if the Board considered these improper attempts to bolster the conclusory factual basis for Contention 4-E, the contention remains inadmissible because the new support offered by NRDC also consists entirely of unsupported assertions and speculation. *Fansteel, Inc.*, CLI-03-13, 58 NRC at 203. The fact that NRDC does not even attempt to link these claims back to the Paine Declaration reinforces the fact that these assertions are, indeed, completely new.

Moreover, the appearance of these new assertions only in NRDC's Reply means that there was no opportunity for either the Applicant or the NRC Staff to contest the validity of these assertions or whether they establish a material dispute with the Application because these claims were *never before raised*. Raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Palisades*, CLI-06-17, 63 NRC at 732. Additionally, allowing a party to raise new claims or provide new support in a reply brief that go unaddressed by the other parties means that the Board will lack a full record on which to make its decision.

Finally, NRDC makes no attempt to justify any of these new additions under the late-filing standards under 10 C.F.R. § 2.309(c) and (f)(2) as required in order to make new claims or provide new support not raised in the Petition itself.

CERTIFICATE OF CONSULTATION

Pursuant to 10 C.F.R. 2.323(b), the Staff contacted the other parties to this proceeding to resolve the issues this motion raises. The parties took the following positions: the Applicant supports this motion and NRDC opposes the substance of this motion.

CONCLUSION

The NRC Staff objects to NRDC's efforts to use its Reply to raise new claims and provide new support for Contention 4-E, in contravention of Commission precedent limiting the scope of replies to answers to intervention petitions. NRDC may not use a Reply to now provide new claims and support for its inadequately supported Contention 4-E, depriving the other parties of a chance to contest its claims and circumventing the Commission's rules on timely filed contentions. Moreover, NRDC does not attempt to meet the late-filing standards in 10 C.F.R. § 2.309(c) and (f)(2) for late-filed contentions. Therefore, the Board should strike or decline to further consider these attempts to add additional bases to Contention 4-E. Regardless, even if the Board considers these bases, NRDC puts forth no expert support for any of these claims or assertions. As a result, even in light of the additional information in the Reply Brief, Contention 4-E remains inadmissible. Accordingly, the Board should strike or decline to further consider the new claims in the Reply.

Respectfully submitted,

/RA/
Maxwell C. Smith
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th Day of January, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION TO STRIKE IMPERMISSIBLE NEW CLAIMS IN NATURAL RESOURCES DEFENSE COUNCIL'S REPLY BRIEF" in the above captioned proceeding have been served upon the following by the Electronic Information Exchange, this 17th day of January, 2012:

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