

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	
)	
EXELON GENERATION COMPANY LLC)	Docket Nos. 50-352-LR
)	50-353-LR
(Limerick Generating Station, Units 1 and 2))	
_____)	January 17, 2012

EXELON’S MOTION TO STRIKE PORTIONS OF NRDC’S REPLY

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a), Exelon Generation Company LLC (“Exelon”) moves to strike portions of “Natural Resources Defense Council (‘NRDC’) Combined Reply to Exelon and NRC Staff Answers to Petition to Intervene” (“Combined Reply”), dated January 6, 2012. As discussed below, the Combined Reply impermissibly includes entirely new arguments, references, and factual claims without satisfying the standards governing late-filed contentions set forth in 10 C.F.R. § 2.309(c) and (f)(2). Accordingly, this new information should be stricken, as identified and discussed below.

II. BACKGROUND

On November 22, 2011, NRDC filed its “Petition to Intervene and Notice of Intention to Participate” (“Petition”). In response, Exelon and the NRC Staff filed timely, separate answers to the Petition on December 20, 2011, and December 21, 2011, respectively.¹ On January 6,

¹ Exelon’s Answer Opposing NRDC’s Petition to Intervene (Dec. 20, 2011); NRC Staff’s Answer to Natural Resource [sic] Defense Council Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011).

2012, NRDC filed its Combined Reply to Exelon’s Answer and the NRC Staff’s Answer.² In the Combined Reply, NRDC does not limit itself to defending the adequacy of its contentions as pled in the Petition. Rather, as discussed in Section IV below, NRDC drifts far afield and portions of its Combined Reply contain new arguments, references, and factual assertions not contained in its Petition.³

III. LEGAL STANDARDS

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers. A reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention.⁴ As the Commission has stated:

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. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).⁵

² By Order of the U.S. Nuclear Regulatory Commission (“Commission”) dated December 22, 2011, the time for NRDC to reply to the Answers filed by Exelon and NRC Staff was extended to January 6, 2012.

³ In a Motion to Strike, Exelon cannot address whether the new arguments, references, and factual assertions identified herein provide an adequate basis for an admissible contention. Therefore, if the Board decides to consider the new arguments, references, and factual assertions contained in the Reply, then Exelon requests an opportunity to respond to the admissibility of the new information in writing and/or during any oral argument scheduled by the Board in this proceeding.

⁴ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, slip op. at 9, 11 (Dec. 22, 2011) (granting in part a motion to strike on the ground that new arguments not raised in the petition for interlocutory review are “outside the appropriate scope of a reply”); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (granting in part a motion to strike and finding that petitioners impermissibly “expand[ed] their arguments” by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contention); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-53, *aff’d* CLI-06-17, 63 NRC 727 (2006) (refusing to consider references to various documents identified in a petitioner’s reply that were not included in the original petition).

⁵ *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

The Commission’s prohibition on new arguments in replies is rooted in the Commission’s interest in conducting adjudicatory hearings efficiently, and on basic principles of fairness. The Commission has recognized that “[a]s 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.”⁶ It has further stated that

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they “realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”⁷

Accordingly, a petitioner must include all of its arguments and claims in its *initial* filing. Allowing a party to amend or supplement its pleadings in reply to the applicant’s or NRC Staff’s answers would run afoul of the Commission’s clear directives:

Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . 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.⁸

Moreover, because NRC regulations do not allow the applicant to respond to a petitioner’s reply, principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the applicant’s or NRC Staff’s answer.⁹ “Allowing new claims in a

⁶ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (“LES”), *recons. denied*, CLI-04-35, 60 NRC 619, 622-23 (2004), .

⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

⁸ *LES*, CLI-04-35, 60 NRC at 622-23 (internal quotes and citation omitted).

⁹ *See* 10 C.F.R. § 2.309(h)(3).

reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims.”¹⁰ Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”¹¹ Accordingly, “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”¹² Any arguments that improperly expand upon that should be stricken.¹³

These principles have recently been applied in the *Davis-Besse* license renewal proceeding. In that proceeding, the petitioners submitted a reply that contained new arguments and factual allegations (including a new attachment) in an attempt to rehabilitate their proposed contention challenging the applicant’s analysis of severe accident mitigation alternatives (“SAMAs”).¹⁴ The licensing board granted the applicant’s motion to strike that new information, ruling that reply pleadings cannot be used to provide new information to expand the scope of and cure defects in proposed contentions.¹⁵

IV. BASES FOR MOTION TO STRIKE

As detailed in the following table, NRDC’s Combined Reply contains numerous new arguments, references, and factual claims that should be stricken. The relevant pages of the

¹⁰ *Palisades*, CLI-06-17, 63 NRC at 732.

¹¹ *LES*, CLI-04-25, 60 NRC at 225.

¹² Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

¹³ A licensing board has the authority to strike individual arguments and exhibits. *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”); *see also Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 399-400, 407, 429 (2008) (granting the applicant’s motion to strike portions of petitioners’ reply that contained new arguments and factual allegations (including a new affidavit and reports) in an attempt to cure deficiencies in the proposed contentions in the petition to intervene).

¹⁴ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Memorandum and Order (Granting Motion to Strike and Requiring Re-Filing of Reply) at 3-4 (Feb. 18, 2011) (unpublished).

¹⁵ *Id.*

Combined Reply with the specific text that Exelon seeks to strike are identified using the “Cross Out Text” function in Adobe Acrobat, and are attached to this Motion as Exhibit 1.

Location of New Information in NRDC’s Combined Reply	Description of New Information
<p><u>Contention 1-E</u></p> <ul style="list-style-type: none"> The text on page 19 beginning with “By not notifying the public,” through the parenthetical quote ending with “provide interested persons an opportunity to comment.’ (Citations omitted))” on page 20. 	<p>These portions of the Combined Reply raise a new legal argument that was not identified in the Petition. The Petition (at 2-3, 31) argued that the 1989 SAMDA in the Limerick FES Supplement could not be relied upon because it was not adjudicated, but NRDC did not provide any legal citation for this argument. In the Combined Reply, NRDC seeks to bolster Contention 1-E by, for the first time, citing the Administrative Procedures Act (“APA”) (5 U.S.C. §§ 553(b), 554(b) and 554(c)(2)) as requiring adjudication of the adequacy of the 1989 SAMDA to trigger the exception for Limerick under 10 C.F.R. § 51.53(c)(3)(ii)(L). Neither the Petition nor supporting affidavits mentioned the APA or 5 U.S.C. § 553 or 554.</p>
<p><u>Contention 1-E</u></p> <ul style="list-style-type: none"> The text on page 23 beginning with “But that argument misses” and ending with “understating the impact of a severe accident. <i>Id.</i>” 	<p>These portions of the Combined Reply provide new information and arguments that were not identified in the Petition. Contention 1-E raised arguments regarding the purported inadequacy of Exelon’s population estimates in the 10-mile and 50-mile radius surrounding Limerick, but did not assert that collective dose would be more significant within 10 miles of a nuclear reactor site than at other locations. NRDC cites to NRDC E Declaration at 22-30 for support, but those paragraphs of the Declaration do not provide support that the 10-mile radius is the “most vulnerable zone.”</p>

Location of New Information in NRDC’s Combined Reply	Description of New Information
<p><u>Contention 3-E</u></p> <ul style="list-style-type: none"> • The text on page 37 beginning with “The applicable standard for application of the”, including the quotation of 10 C.F.R. § 51.53(c)(3)(iii), and ending with “an adequate analysis of severe accident mitigation alternatives.” 	<p>This sentence of the Combined Reply provides a new argument and reference that was not identified in the Petition. Contention 3-E in the Petition (at 21-22) only alleged a deficiency to meet NEI-05-01 Rev. A; it did not discuss or reference 10 C.F.R. § 51.53(c)(3)(iii) as the legal standard for applying the Section 51.53(c)(3)(ii)(L) exception to Limerick. The supporting Declaration also fails to mention Section 51.53(c)(3)(iii) to support Contention 3-E. Discussion of Section 51.53(c)(3)(iii) was limited to Contention 2-E in the Petition.</p>
<p><u>Contention 4-E</u></p> <ul style="list-style-type: none"> • References to Section 8.2 of the GEIS¹⁶ in the following sentences: <ul style="list-style-type: none"> ○ The last full sentence on page 53 beginning with “The GEIS outlines the necessary scope” and ending on page 54 with “in a manner that supports NRDC’s contention.” ○ On page 55, the phrase “but also fails to consider . . . as called for in the GEIS. GEIS at 8-2.” ○ The second to last full sentence on page 56 beginning with “Moreover, in the case of no action” and ending with the cite “GEIS at 8-2 (emphasis added).” ○ On page 67, the last full paragraph, beginning with “Finally” and ending with “several of them are not.” • References to Section 8.3 & 8.3.14 of the GEIS: <ul style="list-style-type: none"> ○ On page 57, beginning with “In fact, the GEIS recognizes” and ending 	<p>These portions of the Combined Reply provide new arguments and references to the GEIS to support Contention 4-E. When referring to the GEIS, the Petition (at 24) and the Paine Declaration (for example, paragraph 4) limit their arguments to the GEIS’ guidance of limiting an alternative to “analysis of single, discrete electric generation sources.” They cite to no other portions of the GEIS to support their arguments.</p> <p>Contention 4-E, however, now references other portions of the GEIS. This includes the guidance that an alternative be “technically feasible and commercially viable” (GEIS, § 8.1),¹⁷ discussion of the No-Action Alternative (GEIS, § 8.2), preferred sets of alternatives (GEIS, § 8.3) and conservation technologies (GEIS, § 8.3.14). Contention 4-E, as initially proffered, nowhere mentions these sections of the GEIS or otherwise quotes or references those sections of the GEIS on which NRDC now belatedly relies.</p>

¹⁶ NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Vol. 1 (May 1996), available at ADAMS Accession No. ML040690705.

¹⁷ Although the NRC Staff raises this portion of the GEIS in its Answer (NRC Staff Answer at 42, 44-45, 50), any NRDC argument that Exelon’s ER did not conform to this guidance could have—and should have—been raised in its Petition, because NRC regulations do not authorize Exelon to file a Sur-Reply. See 10 C.F.R. § 2.323.

Location of New Information in NRDC’s Combined Reply	Description of New Information
<p>with “municipal solid waste combination ‘would be the preferred set of alternatives to replace a single nuclear plant.’ GEIS at 8-16”; and the third and fourth full sentences on page 66 that discuss and contain references to Section 8.3 of the GEIS beginning with “However, as already noted” and ending with “and ‘commercially viable.’”</p> <ul style="list-style-type: none"> ○ On the bottom of page 69, references to and discussion of Section 8.3.14 of the GEIS, beginning with: “But this contravenes the findings of the GEIS” ending with “. . . nuclear plant’(GEIS at 8.3.1.4).”; and the last full sentence on page 71 beginning with “The GEIS assumes” and ending with “. . . nuclear plant. GEIS at 8.3.14.” ● General, new references to the GEIS: <ul style="list-style-type: none"> ○ The phrase “which is governed by other GEIS determinations” on the top of page 57. ○ On page 70, the phrase “and cited to portions of the GEIS that Exelon failed to follow”, and the last full sentence beginning with “But, contrary to NRC Staff’s” and ending with “No Action Alternative.”. 	<p>Furthermore, the Petition unambiguously characterized Contention 4-E as a contention of omission (Petition at 31), and now NRDC contends for the first time that the ER’s <i>existing discussion</i> of reasonable alternatives and demand-side management (“DSM”) contravenes the findings of the newly-cited provisions of the GEIS.</p>
<p><u>Contention 4-E</u></p> <ul style="list-style-type: none"> ● On page 55, the first full sentence beginning with “Items 1, 2, and 3” and ending with “as described in the GEIS”; and the phrase “but also fails to consider a ‘combination of these different outcomes’ as called for in the GEIS. GEIS at 8-2”, which discuss combinations of resources. ● The second to last full sentence on page 56 beginning with “Moreover, in the case of no action” and ending with the 	<p>These portions of the Combined Reply provide new arguments and information that were not identified in the Petition. NRDC asserts for the first time in the Combined Reply that the ER omitted discussion of combinations of the PJM energy portfolio and other resources, and provides new facts as to what Exelon should have considered in its ER. This is the first time NRDC has raised the purported missing discussion of combinations (other than a single ambiguous reference in the Paine Declaration to “combined heat and</p>

Location of New Information in NRDC’s Combined Reply	Description of New Information
<p>cite “GEIS at 8-2 (emphasis added)”; and the sentence on page 57 beginning with “The GEIS goes on to postulate” and ending with the cite “GEIS at 8-16”, which discuss combinations of resources under the No-Action alternative.</p> <ul style="list-style-type: none"> • The phrases “combinations of” and “with conventional nonrenewable technologies” at the bottom of page 57. • The text on page 62 beginning “(a) to comply with existing PJM-area state renewable mandates” and ending with the word technologies” on the top of page 63. 	<p>power”), including DSM combined with conventional nonrenewable technologies. And this is the first time that NRDC argued facts related to other factors that Exelon should have considered, such as evolution of gas prices.</p>
<p><u>Contention 4-E</u></p> <ul style="list-style-type: none"> • The phrase “decentralized and” in the second full sentence on page 56; and the phrase “massive but wildly unrealistic centralized” on page 57. • All but the first paragraph of Section III.B.4 of the Combined Reply, beginning on page 58, challenging the ER’s discussion of and conclusions regarding reasonable alternatives, including solar photovoltaic generation. • The phrase on the top of page 61: “nor do they plausibly represent the way in which these resources will be deployed and integrated in the future if relicensing is denied”. • The paragraph beginning “As noted above” on the bottom of page 61 through the sentence ending “to assume a portion of the system load now served by LGS” on the middle of page 62, discussing solar photovoltaic generation and battery storage systems. • The phrase “either alone or in combination with distributed renewable generation or other electricity resources, such as natural gas-fired generation or Canadian hydropower imports” on the 	<p>These portions of the Combined Reply provide new arguments and information that were not identified in the Petition. Instead of confronting directly the substance of the ER discussion on renewable energy alternatives and DSM, NRDC’s general approach in the Petition was to insist that the ER omitted these subjects. Now that the NRDC has realized that these alternatives were actually cross-referenced in the discussion of the No-Action Alternative, it contends that the existing discussion of the purported missing information is not adequate, in an attempt to rehabilitate its deficient contention of omission.</p> <p>In addition, the new claims in the Combined Reply relating to decentralized generation, solar photovoltaic energy, wind energy, battery storage systems, natural gas-fired generation and Canadian hydropower imports impermissibly expand Contention 4-E to the point that it barely resembles the original contention contained in the Petition.</p>

Location of New Information in NRDC's Combined Reply	Description of New Information
bottom of page 69.	
<p><u>Contention 4-E</u></p> <ul style="list-style-type: none"> • The first full paragraph on page 56, beginning with “While employing” and ending with “playing a larger role in the future.” • The first full paragraph on page 61 beginning with “In the introduction to its alternatives analysis” and ending with “would do so. ER at p. 7-10.”; and the second full sentence on page 65 beginning with “On the contrary” and ending with “‘not ‘feasible’ and indeed, ‘speculative’”, which discuss the ER’s use of hypothetical scenarios in its alternatives analysis. 	<p>These portions of the Combined Reply provide new arguments and information that were not identified in the Petition. Contention 4-E as submitted in the Petition does not challenge any aspect of the ER’s consideration of reasonable alternatives, including the use of hypothetical scenarios.</p>
<p><u>Contention 4-E</u></p> <ul style="list-style-type: none"> • On page 63, the text beginning “thereby providing a <i>bona fide</i> basis” through the end of the paragraph ending “minimize environmental harm’.” 	<p>This portion of the Combined Reply provides a new argument and legal reference that was not identified in the Petition. Contention 4-E in the Petition did not discuss or reference 10 C.F.R. § 51.103(a)(4) as a legal standard for analysis of the No-Action Alternative.</p>

The Licensing Board should strike these new arguments, references, and factual claims that NRDC impermissibly raises for the first time in the Combined Reply. These portions of the Combined Reply fail to “focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.”¹⁸ Instead, these portions of the Combined Reply impermissibly attempt to expand the scope of Contentions 1-E, 3-E and 4-E and attempt to provide new bases and supporting material for the contentions, without addressing the criteria for late-filed or amended contentions in 10 C.F.R. § 2.309(c) and (f)(2). NRDC cannot now try to remedy the defects in its original contentions by providing additional information that is not “narrowly focused” on the legal or logical arguments presented in the Exelon or NRC Staff

¹⁸ *Palisades*, CLI-06-17, 63 NRC at 732.

answer.¹⁹ Instead, NRDC provides new information in its Combined Reply, to which Exelon and the NRC Staff are not allowed to respond. Accordingly, the new arguments, references, and factual claims identified above should be stricken.

V. CONCLUSION

For the foregoing reasons, the Board should strike the new arguments, references, and factual claims impermissibly provided in NRDC's Combined Reply to Exelon's and NRC Staff's Answers to its Petition.

Respectfully submitted,

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

Signed (electronically) by Alex S. Polonsky²⁰

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¹⁹ Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

²⁰ As required by 10 C.F.R. § 2.323(b), on January 10, 2012, counsel for Exelon requested consultation with the parties regarding this motion. Counsel for the NRC Staff agrees with the Motion.

On January 11, counsel for Exelon spoke with Mr. Geoffrey Fettus, NRDC counsel, in an attempt to resolve the issues in this Motion. Mr. Fettus could not take a position on the Motion because NRDC's lead counsel is now Mr. Roisman, and Mr. Roisman was out of the office and could not be consulted until Tuesday, January 17 (the deadline for this Motion). Because this would be too late for proper consultation, Mr. Fettus stated that NRDC would have no objection to extending that window of time to file past Tuesday, giving Exelon an opportunity to consult with Mr. Roisman and then file later in the week. Exelon has chosen to not seek an extension of time to file this Motion because it would generate more work for Exelon, and there is no guarantee that the Board would grant it.

On January 17, 2012, counsel for Exelon also spoke with Mr. Roisman. After learning which portions Exelon proposed to strike, Mr. Roisman stated that NRDC intends to oppose the Motion.

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Dated in Washington, D.C.
this 17th day of January 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

EXELON GENERATION COMPANY LLC)

(Limerick Generating Station, Units 1 and 2))

Docket Nos. 50-352-LR
50-353-LR

January 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012 a copy of “Exelon’s Motion to Strike Portions of NRDC’s Reply” was served by the Electronic Information Exchange on the following recipients:

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