UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
SOUTH CAROLINA ELECTRIC AND GAS CO. and SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (ALSO REFERRED TO AS SANTEE COOPER)	)	Docket Nos. 52-027-COL & 52-028-COL
(Virgil C. Summer Nuclear Station, Units 2 and 3)	)	

CLI-10-21

MEMORANDUM AND ORDER

This proceeding concerns the application of South Carolina Electric and Gas Company and South Carolina Public Service Authority (jointly, Applicants) for a combined license (COL) under 10 C.F.R. Part 52 to construct and operate two Westinghouse AP1000 nuclear reactor units at the Virgil C. Summer Nuclear Station (Summer) in South Carolina. The Sierra Club and Friends of the Earth (jointly, Petitioners) have appealed LBP-10-6,[1] an Atomic Safety and Licensing Board decision denying the only unresolved portions of their intervention petition and

[1] 71 NRC __ (Mar. 17, 2010) (slip op.).

terminating the contested portion of this proceeding.[2] Applicants and the NRC Staff oppose the appeal.[3] We affirm LBP-10-6 and terminate the contested portion of this proceeding.

I. PROCEDURAL BACKGROUND

Following publication of the notice of hearing for this proceeding, Petitioners filed a petition to intervene, seeking a hearing and setting forth three contentions.[4] In those portions of their Contention 3 that are at issue in this appeal, Petitioners assert that Applicants' Environmental Report (ER) inadequately addressed the need for power, energy alternatives, and costs and schedule for the proposed reactors.[5]

In LBP-09-2, the Board denied the petition to intervene and request for hearing. The Board found, among other things, that Friends of the Earth had not demonstrated standing to participate in the proceeding, and that neither Friends of the Earth nor Sierra Club had submitted an admissible contention. Petitioners appealed LBP-09-2.

In CLI-10-1, we affirmed the Board's decision in large part, but reversed and remanded the case to the Board on the limited grounds that it had erred in denying standing to Friends of

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[2] *Brief on Appeal of Sierra Club and Friends of the Earth* (Mar. 26, 2010) (Appeal); *Notice of Appeal by Sierra Club and Friends of the Earth* (Mar. 26, 2010).

[3] *South Carolina Electric and Gas Company Brief in Opposition to Sierra Club and Friends of the Earth Appeal from LBP-10-6* (Apr. 6, 2010); *NRC Staff Brief in Opposition to Appeal of LBP-10-06 by Sierra Club and Friends of the Earth* (Apr. 6, 2010).

[4] *See* Notice of Order, Hearing and Opportunity To Petition for Leave To Intervene, 73 Fed. Reg. 60,362 (Oct. 10, 2008); *Petition to Intervene and Request for Hearing By Sierra Club and Friends of the Earth* (Dec. 8, 2008) (Joint Petition). A third petitioner (Mr. Joseph Wojcicki) also sought intervenor status. The Board denied his petition, we affirmed that denial and, consequently, he is not a participant in this appeal. *See* LBP-09-2, 69 NRC 87 (2009), *aff'd in part and rev'd in part*, CLI-10-1, 71 NRC __ (Jan. 7, 2010) (slip op.).

[5] *See* Joint Petition at 24-26.

the Earth and had given insufficient consideration to Contention 3B, where Petitioners argued that the ER:

> fails to contain sufficient data to aid the Commission in its development of an independent analysis in [that] . . . the Applicant almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management.

The Board in LBP-09-2 had ruled that Contention 3B was *per se* inadmissible on the ground that it contravened our *Clinton* Early Site Permit decision.[6] In that decision, we had concluded that the National Environmental Policy Act's (NEPA) "rule of reason" excluded consideration of demand-side management because the proposed new plant at the Clinton site was intended to be a merchant plant, selling power on the open market, and it was therefore not feasible for its licensee to engage in demand-side management.[7]

In CLI-10-1, we held that the Board had erred in relying upon *Clinton*.[8] Specifically, we concluded that the Board had failed to appreciate a critical distinction between the proposed Clinton and Summer plants – unlike Clinton, the Summer plant would produce baseload power for a defined service area, sold by a regulated utility. We ruled in CLI-10-1 that the Board should not have based its admissibility ruling on our *Clinton* decision, but instead should have considered the contention under our regulations governing contention admissibility. We therefore remanded the case to the Board with instructions to do the latter.

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[6] LBP-09-2, 69 NRC at 109 (citing *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005)).

[7] *See Clinton*, CLI-05-29, 62 NRC at 805-08 (holding that consideration of "energy efficiency" was not a reasonable alternative, where that alternative would not achieve the applicant's goal of providing additional power to sell on the open market, and was not possible for the applicant, who had no transmission or distribution system of its own, and no link to the ultimate power consumer).

[8] CLI-10-1, 71 NRC __ (slip op. at 25-27).

We also ruled that, if the Board on remand were to rule in Petitioners' favor regarding the admissibility of Contention 3B, then the Board should also reconsider its prior ruling in LBP-09-2 that Contentions 3F and 3G were inadmissible.[9] In those contentions, Petitioners argued that the ER:

> fails to contain sufficient data to aid the Commission in its development of an independent analysis [because] . . . Applicant's cost estimate for construction and operation fails to take into account recent rapid increases in the cost of inputs for construction . . ., is based on an unrealistic schedule, and assumes a settled and approved design for its proposed AP1000, which has not yet been established and for which there is no firm date for Commission determination.[10]

We indicated in CLI-10-1 that these cost-related contentions were potentially relevant only if an environmentally preferable alternative had been identified, which would be a possibility in this case only if Contention 3B were admitted.[11] Conversely, we also indicated by necessary implication that if the Board were to exclude Contention 3B, then it must also exclude Contentions 3F and 3G.

On remand, the Board engaged in a painstaking and thorough examination of Petitioners' arguments and evidence regarding Contention 3B, along with a shorter discussion about Contentions 3F and 3G. The Board ultimately concluded that none of the three qualified as an admissible contention. Much of the analysis in LBP-10-6 turned on the Board's

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[9] CLI-10-1, 71 NRC at __ (slip op. at 31-32) (referring to LBP-09-2, 69 NRC at 112, and relying upon *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978)).

[10] Joint Petition at 25-26.

[11] 71 NRC __ (slip op. at 31-32).

conclusions that Petitioners' arguments and evidence were cursory, speculative, insufficiently supported, and/or insufficiently connected to the application's purported flaws.[12]

II. DISCUSSION

In exercising our appellate responsibilities, we defer to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion.[13] We find neither of these flaws in LBP-10-6. Much of Petitioners' appeal is a mere recitation of earlier arguments, without explanation as to how they demonstrate legal error or abuse of discretion on the Board's part.[14] Many of those appellate arguments constitute *de facto* requests for reconsideration of CLI-10-1, although Petitioners do not attempt to satisfy our reconsideration standards as set forth in 10 C.F.R. §§ 2.323(e), 2.341(d), and 2.345.[15] And the remainder of the appeal is a presentation of new arguments that could have been, but were not,

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[12] *See* LBP-10-6, 71 NRC __ (slip op. at 10, 15-34).

[13] *See*, *e.g.*, *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009).

[14] *See PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007) (criticizing a petitioner who "simply repeats or adds to his previous claims").

[15] *See*, *e.g.*, Appeal at 1, 8, 9, 19, 20 (Petitioners' explicit and implicit references to Contention 3E, which we did not remand to the Board in CLI-10-1). *See also* Appeal at 9-10 (Petitioners' arguments regarding Contention 3A), 14 & 20 (same regarding Contention 3C), and 13-14, 18-20 (same regarding Contention 3D); CLI-10-1, 71 NRC __ (slip op. at 19-23 (affirming Board's ruling that Contention 3A was inadmissible), 27-29 (same regarding Contentions 3C and 3D)). Setting aside the question of timeliness, Petitioners have neither sought leave to request reconsideration of CLI-10-1 nor set forth compelling circumstances that Petitioners could not reasonably have anticipated and that would render CLI-10-1 invalid. *See generally Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC __ (Mar. 11, 2010) (slip op. at 8-9); *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 522 (2007).

presented earlier in this proceeding.[16] In all of these respects, Petitioners have contravened our adjudicatory practice and procedure.

As we observed earlier in this proceeding, our contention admissibility "requirements are deliberately strict, and we will reject any contention that does not satisfy" them.[17] We find no error of law or abuse of discretion in the Board's conclusion that Petitioners' Contention 3B fails to satisfy these standards, and we affirm based on the Board's thorough analysis in LBP-10-6.[18] Further, given our affirmation of the Board's ruling on the inadmissibility of Contention 3B, we need not reach Petitioners' arguments regarding Contentions 3F and 3G.[19]

III. CONCLUSION

For the reasons set forth above, we *affirm* LBP-10-6 and terminate the contested portion of this proceeding.

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[16] *See* Appeal at 21-23. *See*, *e.g.*, *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) ("absent extreme circumstances, we will not consider on appeal either new arguments or new evidence supporting the contentions which the Board never had the opportunity to consider" (footnote, internal quotation marks and brackets omitted)).

[17] CLI-10-1, 71 NRC __ (slip op. at 8) (quoting *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)). *See* 10 C.F.R. § 2.309(f)(1).

[18] *See*, particularly, LBP-10-6, 71 NRC __ (slip op. at 21-29).

[19] As noted above, we held in CLI-10-1 that those two contentions could become relevant only if Contention 3B were admitted. 71 NRC __ (slip op. at 31, 32 n.118).

IT IS SO ORDERED.

For the Commission

[NRC Seal]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of August, 2010.