UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-09-03

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James F. Jackson

In the Matter of	Docket Nos. 52-025-COL and 52-026-COL
SOUTHERN NUCLEAR OPERATING CO.	ASLBP No. 09-873-01-COL-BD01
(Vogtle Electric Generating Plant, Units 3 and 4)	March 5, 2009

MEMORANDUM AND ORDER
(Ruling on Standing and Contention Admissibility)

On March 31, 2008, Southern Nuclear Operating Company (SNC) applied to the Nuclear Regulatory Commission (NRC) for a combined license (COL) under 10 C.F.R. Part 52 to construct and operate two new units employing Westinghouse Electric Corporation (WEC) AP1000 advanced passive pressurized water reactors at the Vogtle Electric Generating Plant (VEGP) site near Waynesboro, Georgia. On November 17, 2008, five organizations -- the Center for a Sustainable Coast, Savannah Riverkeeper, the Southern Alliance for Clean Energy, the Atlanta Women's Action for New Directions, and the Blue Ridge Environmental Defense League (hereinafter referred to collectively as Joint Petitioners) -- jointly filed a hearing petition seeking to intervene and challenge the SNC COL application (COLA). Both applicant SNC and the NRC staff oppose the petition as failing to provide any admissible contentions.

For the reasons set forth below, we find that each of the petitioning organizations has established the requisite standing to intervene in this proceeding and that they have submitted one admissible contention, SAFETY-1, which questions the completeness of the SNC COLA's

consideration of low-level radioactive waste (LLRW) storage and is set forth in an appendix to this decision. Accordingly, we admit each of the Joint Petitioners as a party to this proceeding. Additionally, we outline certain procedural and administrative rulings regarding the litigation of the admitted contention, as well as refer to the Commission our ruling finding inadmissible contentions MISC-1 and MISC-2, which concern the purported lack of completeness of the SNC COLA because of the pendency of two revisions to the WEC AP1000 certified standard design (CSD).

I. BACKGROUND

A. 10 C.F.R. Part 52 Licensing Process and the SNC COLA

The 10 C.F.R. Part 50 licensing process, which was employed for the 104 commercial nuclear power plants currently operating in the United States, requires that an applicant first obtain a construction permit for the facility, followed by an operating license. Both licenses are issued separately and, under section 189a of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. § 189a, hearing rights accrue separately as to each requested permission. Under the 10 C.F.R. Part 52 licensing process initially adopted in 1989, an entity may apply for a single COL that authorizes both new reactor construction and operation. Specifically, Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and conditional operating license for a nuclear power plant and the conduct of the hearing that is afforded in connection with a COLA. As was noted in the statement of considerations supporting the Part 52 rulemaking proposal, a COL is "essentially a construction permit which also requires consideration and resolution of many of the issues currently considered at the operating license stage." See Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,062 (Aug. 23, 1988).

The general requirements for the contents of a COL application are set forth in 10 C.F.R. §§ 52.79-.80.

Additionally, under Subpart C of Part 52, a COL applicant can reference a CSD for the reactor facility it proposes to construct and operate. See 10 C.F.R. § 52.73(a). Because a CSD is the product of an agency rulemaking process conducted pursuant to Subpart B of Part 52 in which a reactor design is reviewed and approved for future use, if a CSD is referenced in a COLA, in the context of an adjudicatory challenge to the COLA, and absent a petition under 10 C.F.R. § 2.335 seeking a waiver, the Commission will treat the CSD as resolving all matters that could have been raised in the design certification rulemaking. See id. § 52.83(a).

Under 10 C.F.R. Part 52, Subpart A, an applicant interested in constructing and operating a new nuclear power plant also can apply for an early site permit (ESP). An ESP allows an applicant to resolve key site-related environmental, safety, and emergency planning issues before choosing the particular facility design for, or deciding to build such a facility on, a designated site, essentially allowing the applicant to "bank" a possible site for the future construction of a specified number of new nuclear facilities. See id. § 52.39(a). SNC has, in fact, filed such an ESP application proposing the construction of two new units, Vogtle Units 3 and 4, at the existing VEGP site where two SNC-owned power reactors have been operating since 1987. See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 247 (2007). The SNC ESP application is currently under review by the NRC staff and is the subject of an adjudicatory hearing before another licensing board.

On March 31, 2008, SNC applied under 10 C.F.R. Part 52, Subpart C, for a COL for Vogtle Units 3 and 4, to be constructed utilizing the AP1000 CSD revision 15, which has been duly certified.[1] See 10 C.F.R. Part 52, App. D.

B. Joint Petitioners Hearing Request/Licensing Board Establishment and Initial Procedures

In response to a September 16, 2008 notice of hearing and opportunity to petition for leave to intervene regarding the Vogtle COL application, 73 Fed. Reg. 53,446 (Sept. 16, 2008), on November 17, 2008, Joint Petitioners filed a timely request for hearing and petition to intervene in which they sought to establish their standing and the admissibility of three proposed contentions. See Petition for Intervention (Nov. 17, 2008) [hereinafter Intervention Petition]. Thereafter, on December 2, 2008, this Atomic Safety and Licensing Board was established to adjudicate this contested portion of the Vogtle COL proceeding. See [SNC]; Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 74,532 (Dec. 8, 2008). In an initial prehearing order issued the same day, in addition to establishing certain procedural measures, the Board requested that Joint Petitioners consider whether each of their contentions could be designated under one of nine different subject matter categories associated with the provisions of the SNC COLA, including Final Safety Analysis Report (SAFETY) and Miscellaneous (MISC). The order also established that unless Joint Petitioners advised the Board of any objections by December 5, 2008, Joint Petitioners three contentions, originally designated as Technical Contention 1, Technical Contention 2, and Safety Contention 1, would be re-labeled as MISC-1, MISC-2, and SAFETY-1, respectively. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) at 2-3 (unpublished) [hereinafter Initial Prehearing Order]. Joint Petitioners subsequently made no objection to these labels.

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[1] An electronic copy of the SNC COLA for Vogtle Units 3 and 4 can be found on the NRC website at http://www.nrc.gov/reactors/new-reactors/col/vogtle.html (last visited Mar. 4, 2009).

On December 12, 2008, SNC and the staff filed responses to Joint Petitioners hearing request in which they did not contest the standing of the five organizations seeking to intervene in this proceeding, but indicated they opposed the admission of any of Joint Petitioners proffered contentions. See [SNC]'s Answer Opposing Petition to Intervene (Dec. 12, 2008) at 3 [hereinafter SNC Answer]; NRC Staff Answer to "Petition for Intervention" (Dec. 12, 2008) at 1 [hereinafter Staff Answer]. After requesting and being granted an extension of time to submit their response to the SNC and staff answers, see Petitioners' Motion for Extension of Time to Reply to Responses to Contentions (Dec. 16, 2008); Licensing Board Order (Granting Motion for Extension of Time to File Reply) (Dec. 18, 2008) (unpublished), on December 23, 2008 Joint Petitioners filed a reply to those answers. See Petitioners' Reply to SNC Answer Opposing Petition to Intervene and NRC Staff Answer to Petition for Intervention (Dec. 23, 2008) [hereinafter Joint Petitioners Reply].

Thereafter, in line with several orders establishing the time, place, and procedures for an initial prehearing conference,[2] on January 28, 2009, the Board heard arguments regarding the admissibility of Joint Petitioners three contentions, see Tr. at 1-113. SNC and the staff participating from the Licensing Board Panel's Rockville, Maryland hearing room, while Joint Petitioners took part via videoconference from a public conference room in the agency's Region II offices in Atlanta, Georgia,

Subsequent to the January 2009 oral argument, the Commission issued rulings in the Bellefonte and Fermi COL proceedings, see Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC __ (Feb. 17, 2009); Detroit Edison Co. (Fermi

[2] See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference Regarding Contention Admissibility; Opportunity for Written Limited Appearance Statements) (Dec. 31, 2008) at 2-4 (unpublished); Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference; Providing Oral Argument Questions) (Jan. 14, 2009) at 1-3 (unpublished).

Unit 3), CLI-09-4, 69 NRC __ (Feb. 17, 2009), and the Licensing Board in the Summer COL proceeding issued a decision, see South Carolina Electric & Gas Company and South Carolina Public Service Authority (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC __ (Feb. 18, 2009), regarding contentions similar to one or more of Joint Petitioners three contentions. As a consequence, the Board afforded the parties an opportunity to provide their views regarding the impact of these decisions on the admissibility of Joint Petitioners contentions in this proceeding. See Licensing Board Memorandum and Order (Request for Statements of Position and Notice of Need for More Time) (Feb. 18, 2009) (unpublished); Licensing Board Memorandum and Order (Amended Opportunity to Provide Statements of Position) (Feb. 19, 2009) (unpublished). On February 24, 2009, SNC, the staff, and Joint Intervenors filed statements of position regarding those decisions. See Petitioners' Statement of Position (Feb. 24, 2009) [hereinafter Joint Petitioners Position Statement]; [SNC]'s Statement of Position (Feb. 24, 2009) [hereinafter SNC Position Statement]; NRC Staff Statement of Position (Feb. 24, 2009) [hereinafter Staff Position Statement].

II. ANALYSIS

A. Joint Petitioners Standing

1. Standards Governing Standing

In determining whether an individual or organization should be granted party status in a proceeding based on standing "as of right," the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, the National Environmental Policy Act of 1969 (NEPA),

42 U.S.C. § 4321, et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite standing elements. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. See Vermont Yankee Nuclear Power Corp. & Amergen Vermont, LLC (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000). In assessing a petition to determine whether these elements are met, which a licensing board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

We apply these rules and guidelines in evaluating each of Joint Petitioners standing presentations.

2. Atlanta Women's Action for New Directions (Atlanta WAND)

DISCUSSION: Intervention Petition at 5-7; SNC Answer at 3; Staff Answer at 10-11.

RULING: Atlanta WAND asserts it is a not-for-profit organization whose members oppose the issuance of a COL to SNC for the proposed Vogtle units. Attached to Joint Petitioners hearing request are the affidavits of two WAND members, each of whom states that Atlanta WAND is authorized to represent his or her interests. Both members assert they live

within fifty miles of the VEGP site, one residing within six miles of the facility.[3] The Board concludes these individuals' asserted health, safety, and environmental interests and their agreement to permit Atlanta WAND to represent their interests are sufficient to establish Atlanta WAND's standing to intervene in this proceeding.

3. Blue Ridge Environmental Defense League (BREDL)

DISCUSSION: Intervention Petition at 5-7; SNC Answer at 3; Staff Answer at 11-17.

RULING: BREDL claims it is a not-for-profit organization whose members oppose the issuance of a COL to SNC for the proposed Vogtle units. Attached to Joint Petitioners hearing request are the affidavits of forty-three BREDL members, each of whom states that BREDL is authorized to represent his or her interests. At least thirty-seven of these members assert they live within fifty miles of the VEGP site, with the closest living some twelve miles from the facility. The Board finds that these individuals' asserted health, safety, and environmental interests and their agreement to permit BREDL to represent their interests are sufficient to establish BREDL's standing to intervene in this proceeding.

4. Center for a Sustainable Coast (CSC)

DISCUSSION: Intervention Petition at 5-7; SNC Answer at 3; Staff Answer at 18-20.

RULING: CSC states it is a not-for-profit organization whose members oppose the issuance of a COL to SNC for the proposed Vogtle units. Attached to Joint Petitioners hearing request are the affidavits of two CSC members, each of whom declares that CSC is authorized to represent his interests. One member resides within thirty-four miles of the VEGP site. The Board concludes this individual's asserted health, safety, and environmental interests and his

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[3] Relative to the individuals who provided affidavits in support of the standing of each of the organizations that constitute Joint Petitioners, the Board used Google Earth to confirm the distance from the VEGP of the individual purportedly residing nearest to the facility. See 10 C.F.R. § 2.337(f); see also PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 20 n.11, appeal denied, CLI-07-25, 66 NRC 101 (2007).

agreement to permit CSC to represent his interests are sufficient to establish CSC's standing to intervene in this proceeding.

5. Savannah Riverkeeper (SR)

DISCUSSION: Intervention Petition at 5-7; SNC Answer at 3; Staff Answer at 20-21.

RULING: SR declares it is a not-for-profit organization whose members oppose the issuance of a COL to SNC for the proposed Vogtle units. Attached to Joint Petitioners hearing request are the affidavits of two SR members, each of whom states that SR is authorized to represent his or her interests. Both live within fifty miles of the VEGP site, and one lives within twenty-four miles of the facility. The Board finds these individuals' asserted health, safety, and environmental interests and their agreement to permit SR to represent their interests are sufficient to establish SR's standing to intervene in this proceeding.

6. Southern Alliance for Clean Energy (SACE)

DISCUSSION: Intervention Petition at 5-7; SNC Answer at 3; Staff Answer at 21-22.

RULING: SACE asserts it is a not-for-profit organization whose members oppose the issuance of a COL to SNC for the proposed Vogtle units. Attached to Joint Petitioners hearing request are the affidavits of three SACE members, each of whom states that SACE is authorized to represent his or her interests. At least two members live within fifty miles of the VEGP site, with one as close as twenty-eight miles from the facility. The Board finds these individuals' asserted health, safety, and environmental interests and their agreement to permit SACE to represent their interests are sufficient to establish SACE's standing to intervene in this proceeding.

B. Joint Petitioners Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of the basis of the contention; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." Id. § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); see also Arizona Public Service Co. (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155-56 (1991). NRC case law has further developed these requirements, as is summarized below:

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. See Philadelphia Electric Co. (Peach

Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.335; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20-21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. See 10 C.F.R. § 2.309(f)(1)(iii); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be

rejected. See Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. See 10 C.F.R. § 2.309(f)(1)(v); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff'd in part, CLI-95-10, 42 NRC 1, and CLI-95-12, 42 NRC 111 (1995). While a Board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected. See Palo Verde, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. See Palo Verde, CLI-91-12, 34 NRC at 155; Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); Georgia Tech Research Reactor, LBP-95-6, 41 NRC at 305. Likewise, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. See Fansteel, CLI-03-13, 58 NRC at 204-05. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), rev'd in part on other grounds,

CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply adequate support for the contention. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

To be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. See 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. See Yankee Nuclear, LBP-96-2, 43 NRC at 75-76; see also Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

e. Insufficient Challenges to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the Safety Analysis Report and the Environmental Report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), review declined, CLI-94-2, 39 NRC 91 (1994); Texas Utilities Electric Co. (Comanche

Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Joint Petitioners Contentions

a. MISC-1 (AP1000 Revision 16) and MISC-2 (AP1000 Revision 17)

CONTENTION MISC-1: SNC's COLA is incomplete because many of the major safety components and operational procedures of the proposed VEGP Units 3 and 4 either (1) have been omitted altogether or (2) are conditional at this time and will be for the indefinite future. Modifications to such safety components or operational procedures could cause substantial changes to the COLA. Regardless of whether the design of VEGP Units 3 and 4 is certified or not, a meaningful technical and safety review of the COLA cannot be conducted without the full disclosure of the final and complete reactor design.

CONTENTION MISC-2: SNC's COLA is incomplete because many of the major safety components and operational procedures at the proposed VEGP Units 3 and 4 either (1) have been omitted altogether or (2) are conditional at this time and will be for the indefinite future. Moreover, in connection with Westinghouse's submission of Revision 17, SNC is now required to either adopt Revision 17 or resubmit its COLA as a plant-specific design. Either course of action will require substantial changes to the COLA, which as currently drafted incorporates Revision 16 — a revision no longer being reviewed by the NRC Staff. Regardless of whether the design of VEGP Units 3 and 4 is certified or not, a meaningful technical and safety review of the COLA cannot be conducted without the full disclosure of the final and complete reactor design.

DISCUSSION: Intervention Petition at 8-14; SNC Answer at 11-26; Staff Answer at 23-39; Joint Petitioners Reply at 2-8; Tr. at 30-80; Joint Petitioners Position Statement at 5-6; SNC Position Statement at 5-8; Staff Position Statement at 1-3.

RULING: As Joint Petitioners noted during oral argument, see Tr. at 30-31, these contentions are essentially identical except that MISC-1 deals with revision 16 to the AP1000 certified design, while MISC-2 concerns the more recently submitted revision 17. Because we find that the admissibility of both are governed by the same precepts, we deal with them in the same ruling, finding them inadmissible in that these contentions and their foundational support, having failed to proffer a specific, sufficiently-supported, material issue regarding a safety concern associated with the interaction between the pending AP1000 DCD revisions and the Vogtle COLA, are an impermissible challenge to Commission regulatory requirements. See

section II.B.1.a, .c, .d, .e supra. Moreover, as is explained in more detail below, because of the novel, generic aspects of these contentions, we refer this ruling to the Commission.

On January 27, 2006, the Commission issued the AP1000 final design certification rule (DCR), based on revision 15 of the WEC design certification document (DCD). See AP1000 Design Certification, 71 Fed. Reg. 4464 (Jan. 27, 2006). As a consequence, applicants seeking to construct and operate a plant based on the AP1000 design can do so by referencing this DCR, as set forth in 10 C.F.R. Part 52, App. D. See 10 C.F.R. § 52.73(a). Subsequently, however, in a May 26, 2007 letter, WEC submitted an application to amend the AP1000 DCR via revision 16 of the AP1000 DCD. This was followed on September 22, 2008, by an updated application to amend the AP1000 DCD.[4] That update, revision 17, contains both the DCD changes submitted in revision 16 as well as new DCD changes.[5] Both DCD revision 16, which is referenced in the SNC COLA for Vogtle Units 3 and 4,[6] and revision 17, which has not yet been referenced in the SNC application,[7] currently are under review by the NRC staff and are

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[4] These documents relating to the pending AP1000 revisions 16 and 17, as well as information on the current status of the AP1000 revisions, currently can be found at www.nrc.gov/reactors/new-reactors/design-cert/amended-ap1000.html (last visited Mar. 4, 2009).

[5] As the staff observed in its answer, in proffering AP1000 CSD revision 16, WEC republished the entire DCD with various amendments. See Staff Answer at 30. According to the staff, revision 17 takes a similar approach, in that it incorporates the revision 16 proposed DCD amendments as well as proposes additional changes to the AP1000 CSD. See id. at 36-37. Although the staff is no longer reviewing revision 16 as a separate submission because it is subsumed by revision 17, see id., since SNC has yet to reference revision 17, in this decision we will refer separately to each revision.

[6] See Letter from J. A. Miller, SNC Senior Vice President, to NRC Document Control Desk at 1 (Mar. 28, 2008) (Vogtle Units 3 and 4 COLA incorporates by reference 10 C.F.R. Part 52, App. D, and May 26, 2007 WEC application for revision 16 amendment to portions of AP1000 DCD) (ADAMS Accession No. ML081050133).

[7] During the January 28 oral argument, SNC counsel indicated the applicant intends to reference revision 17 in its COLA in March or April 2009. See Tr. at 54-55.

likely to continue to be so for some time to come as part of a design certification rulemaking process.

As framed by Joint Petitioners two contentions, the current situation now before the Board and the participants -- i.e., a Part 52 COLA referencing a CSD that, while previously approved, now faces potential modification in the form of pending DCD revisions that both have and have not been incorporated into the COLA -- is no doubt one the Commission hoped reactor designers and COL applicants would avoid so as to maximize the longstanding "reliability" and "finality" hallmarks of the Part 52 CSD, ESP, and COL processes.[8] At the same time, this is a happenstance the Commission has recognized may occur, and could result in a properly framed contention being admitted and held in abeyance pending resolution of the DCR.[9]

In this instance, referencing various specific portions of the Vogtle Units 3 and 4 COLA that purportedly would be affected by the DCD amendments in pending revisions 16 and 17 and

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[8] See Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15,372, 15,376 (Apr. 18, 1989) (achieving enhanced safety that standardization makes possible will be frustrated by permitting too frequent changes to either CSD or plants referencing CSD); see also Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,368 (Aug. 28, 2007) (Commission goals for design certification include early resolution of all design issues and finality for those issue resolutions, which would avoid repetitive consideration of design issues in individual COL proceedings).

[9] See Progress Energy Carolinas, Inc. (Combined License Application for Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC __, __ & nn.5, 8 (slip op. at 3-4 & nn.5, 8) (argument that COLA hearing notice should be delayed until completion of certified design rulemaking for AP1000, revision 16, fails to recognize Commission direction that a contention raised in COL hearing challenging information in a design certification rulemaking, if otherwise admissible, should be referred to the staff for consideration in the rulemaking, and held in abeyance by licensing board pending outcome of rulemaking) (citing 10 C.F.R. § 52.55(c) and Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)); see also Fermi, CLI-09-4, 69 NRC at __ (slip op. at 7-8) (consistent with its Shearon Harris decision, Commission declines to suspend proceeding pending outcome of ESBWR design certification process).

citing a recent Licensing Board decision in Progress Energy Carolinas, Inc. (Combined License Application for Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC __, __ (slip op. at 8-9) (Oct. 30, 2008) (appeal pending with the Commission), Joint Petitioners assert that because these DCD amendments have not been approved in a design certification rulemaking (and, in the case of revision 17, are not yet even referenced in the Vogtle Units 3 and 4 COLA), contentions MISC-1 and MISC-2 are contentions of omission that must be admitted and referred to the staff for consideration in the design certification rulemaking while being held in abeyance by the Board pending resolution of the efficacy of the proposed revisions. On the other hand, declaring that Joint Petitioners have not raised any specific technical deficiency regarding any of the provisions of the COLA that would be impacted by the proposed WEC AP1000 DCD revisions 16 and 17, all of which they assert are accounted for in the AP1000 standard design and the COLA, and relying on recent Licensing Board decisions in Duke Energy Carolinas, LLC (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC __, __ (slip op. at 10-12) (Sept. 22, 2008), and Summer, LBP-09-2, 69 NRC at __ (slip op. at 8-13),[10] both SNC and the staff assert that these two contentions should be dismissed for a combination of deficiencies, including being beyond the scope of this COL proceeding, failing to raise a material issue or a genuine dispute on a material issue of law or fact, lacking competent factual or expert support, and improperly challenging NRC regulations.

[10] Applicant SNC also relies on another, more recent ruling in the Shearon Harris COL proceeding in which the Licensing Board denied the admission of a new contention challenging the sufficiency of the COLA in light of the applicant's action incorporating AP1000 DCD revision 17 into its application. See Tr. at 58-59; see also Letter from M. Stanford Blanton, SNC Counsel, to Licensing Board (Jan. 29, 2009) (enclosing copy of Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Dec. 23, 2008) (unpublished)).

Absent a future exemption request, SNC cannot obtain a COL for Vogtle Units 3 and 4 until the DCR process for COLA-referenced revision 16 (and the apparently soon-to-be-referenced revision 17) is completed by incorporating any COLA-referenced revisions into the AP1000 CSD. See Staff Answer at 31 n.35. At the same time, both contentions MISC-1 and MISC-2 reflect Joint Petitioners concern about whether, under the more stringent admissibility requirements that apply generally to contentions that are submitted after a timely initial hearing petition, they will have a "realistic opportunity" to interpose a post-DCR challenge to the completeness and adequacy of the SNC COLA relative to any DCD revisions resulting from such a rulemaking.[11] Tr. at 39.

While perhaps not untoward, this concern about the travails of the post-initial intervention contention admission process nonetheless does not provide the basis for the sort of open-ended, placeholder contentions Joint Petitioners now seek to have admitted. Rather than asserting, based on documentary material or expert analysis, that some particular facet of the proposed DCD changes set forth in revisions 16 or 17 creates a safety issue or has a safety impact relative to some specific aspect of either the existing AP1000 CSD or the two new Vogtle units, the focus of contentions MISC-1 and MISC-2 is a generalized concern that because the design issues reflected in revisions 16 and 17 will remain unresolved pending the completion of the AP1000 DCR to incorporate these changes, the SNC COLA is somehow fatally incomplete. See Joint Petitioners Reply at 4 n.6. But given that a pending DCD revision clearly can be referenced in a COLA, see 10 C.F.R. § 52.55(c), Joint Petitioners failure in contentions MISC-1 and MISC-2 to frame a specific, sufficiently-supported, material issue regarding a safety

[11] Although they undoubtedly can participate in the DCR process relative to revisions 16 or 17 to interpose any technical concerns about the sufficiency or adequacy of these revisions relative to the existing AP1000 DCD, see Tr. at 64, 72, Joint Petitioners provided no indication whether they intend to institute such a challenge.

concern arising from the interaction of the proposed DCD amendments with the existing CSD and/or the facility-specific provisions of the Vogtle COLA leaves these contentions as no more than inadmissible challenges to the Part 52 regulatory framework.

That these particular contentions are inadmissible does not necessarily render Joint Petitioners concerns about their future ability to question the Vogtle COLA-related safety impacts of proposed AP1000 DCD revisions 16 and 17 as wholly without merit. Assuming that a post-DCR COLA-related safety issue can be framed, uncertainty about the appropriate application of the various "late-filing" factors in section 2.309 that govern the admission of new or amended contentions[12] and the applicability of the reopening standards of section 2.326,[13] presents a situation not wholly unlike that recently before the Commission in the MOX proceeding. There, the Commission acted to clarify the application of these procedural provisions in an instance when, due to factors beyond the intervenor's control, the distinct possibility existed that issues might arise regarding the sufficiency of a pending license

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[12] In contrast to Commission references suggesting the general application of the "nontimely" filing standards in section 2.309(c) to new and amended contentions, see Nuclear Mgmt. Co. LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); see also Shaw Areva MOX Services, Inc. (Mixed Oxide Fuel Facility), CLI-09-02, 69 NRC __, __ & n.47 (slip op. at 11-12 & n.47) (Feb. 4, 2009), as the Licensing Board in the Vogtle ESP case observed recently in dealing with the admissibility of a new contention, there are several Licensing Board decisions that indicate the language of section 2.309(f)(2) adopted in the extensive 2004 10 C.F.R. Part 2 revision makes it clear those standards are not applicable in the context of new or amended contentions, at least so long as the new or amended contention is "timely" filed relative to the event that provides the triggering basis for that contention, Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Licensing Boad Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) at 10 & nn.5-6 (unpublished).

[13] Relative to the application of the agency's section 2.326 record reopening standards at a point late in a proceeding, there may well be a difference between, on the one hand, an instance in which a new intervention petition and/or contention is filed after any evidentiary hearing regarding admitted contentions has been conducted and the record closed and, on the other, a circumstance in which (1) all participant contentions previously admitted in the proceeding have been resolved by settlement or summary disposition prior to holding an evidentiary hearing; or (2) following the initial hearing opportunity notice for the proceeding, no hearing request was submitted or no submitted hearing request was granted.

application sometime after the adjudication on admitted contested issues would have been concluded. See Shaw Areva MOX Services, Inc. (Mixed Oxide Fuel Facility), CLI-09-02, 69 NRC __, __-__ (slip op. at 9-13) (Feb. 4, 2009).

Given that appeals from the Shearon Harris COL case, upon which Joint Petitioners place significant reliance in seeking the admission of this contention, and the Summer COL proceeding currently are pending with the Commission, consistent with the general policy preference expressed by the Commission for obtaining generic consideration and resolution of issues posed in several COL proceedings, see Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,971-72 (Apr. 17, 2008), pursuant to 10 C.F.R. §§ 2.323(f), 2.341(f), we find this a significant and novel matter whose resolution will materially advance the disposition of this (and other) proceedings such that we will refer our ruling regarding these contentions to the Commission for its immediate consideration.

b. SAFETY-1 (Disposal of LLRW)

> CONTENTION: SNC's COLA is incomplete because the FSAR fails to consider how SNC will comply with NRC regulations governing storage and disposal of LLRW in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.

DISCUSSION: Intervention Petition at 14-16; SNC Answer at 26-32; Staff Answer at 40-49; Joint Petitioners Reply at 8-12; Tr. at 80-109; Joint Petitioners Position Statement at 2-5; SNC Position Statement at 1-5; Staff Position Statement at 3-5.

RULING: As discussed below, admitted in that this contention and its foundational support are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Stemming from the alleged potential unavailability of a disposal site for 10 C.F.R. § 61.55(a) Class B or C LLRW for proposed Vogtle Units 3 and 4 due to the recent closure of the Barnwell, South Carolina low-level waste disposal facility to all waste other than that from facilities located in Connecticut, New Jersey, and South Carolina, this contention is similar to

contentions admitted by licensing boards in the North Anna and Bellefonte COL proceedings. See Virginia Electric & Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC __, __ (slip op. at 21-32) (Aug. 15, 2008); Tennessee Valley Authority (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 68 NRC __, __ (slip op. at 57-60) (Sept. 12, 2008), rev'd, CLI-09-3, 69 NRC at __ (slip op. at 5-9). Joint Petitioners assert that the SNC final safety analysis report (FSAR) "contains no explanation of the specific waste management actions SNC will take if there is still no waste disposal facility available for Class B and C waste when VEGP Units 3 and 4 begin operations" and "fails to demonstrate how SNC can comply with the NRC regulations regarding LLRW disposal using only the existing storage facilities (designated for VEGP Units 1 and 2)." Intervention Petition at 14. Additionally, Joint Petitioners contend that the FSAR "does not address long term storage procedures or realistically consider the size and space limitations of the existing storage facilities" and "omits a discussion of the health impacts on SNC employees from the additional LLRW storage." Id. at 16.

SNC counters that this contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi) in that (1) addressing LLRW disposal, as defined in 10 C.F.R. Part 61, is not required in a COL application and is therefore not material to the proceeding, (2) the information Joint Petitioners claim to be omitted is in fact present in the FSAR, and therefore Joint Petitioners do not raise a material issue of fact or law, and (3) the contention is not supported by alleged facts or expert opinion. See SNC Answer at 27-29. The staff also opposes admission of this contention, arguing that the purportedly omitted information is in fact in the FSAR, no disposal discussion is required in a COLA, and Joint Petitioners fail to support the claim that any additional monitoring of occupational exposure specifically related to LLRW storage needs to be addressed. See Staff Answer at 41-48. Additionally, both SNC and the staff asserted at oral argument that the contention is inadmissible because a COL applicant is

not required under NRC regulations to address extended onsite LLRW storage. See Tr. at 86, 95-96.

Joint Petitioners contention SAFETY-1 clearly meets the requirements of 10 C.F.R. § 2.309(f)(1)(i) and (iii). It provides a statement of the issue of law or fact Joint Petitioners seek to raise, see 10 C.F.R. § 2.309(f)(1)(i), namely that certain information was omitted concerning storage of LLRW in the absence of an offsite disposal facility that should have been included in the COLA for proposed Vogtle Units 3 and 4. Moreover, because Joint Petitioners challenge the legal sufficiency of the COLA, the contention is within the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii).

Joint Petitioners have also provided sufficient factual allegations to support contention SAFETY-1 so as to satisfy 10 C.F.R. § 2.309(f)(1)(v). Contention SAFETY-1 is a contention of omission. As such, Joint Petitioners need only "'identify[] the regulatively required missing information'" and provide enough facts to show that the application is incomplete. See North Anna, LBP-08-15, 68 NRC at __ (slip op. at 27) (quoting Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, 63 NRC 403, 414 (2006)). Joint Petitioners have identified the information they claim to be missing: they assert the FSAR should have discussed how SNC will comply with NRC regulations for waste storage and disposal in the absence of offsite disposal for the LLRW the new Vogtle units will produce, specifically noting that the FSAR "does not address long term storage procedures or realistically consider the size and space limitations of the existing storage facilities" and "omits a discussion of the health impacts on SNC employees from the additional LLRW storage." See Intervention Petition at 16.

Additionally, Joint Petitioners satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(ii) to provide a brief explanation of the basis of the contention. Joint Petitioners claim that SNC's COLA omits information necessary to satisfy "NRC regulations governing storage," Intervention

Petition at 14, which they clarified in their reply and at oral argument as 10 C.F.R. § 52.79(a)(3) and, through it, the radiation exposure limits of 10 C.F.R. Part 20.[14] See Joint Petitioners Reply at 10, Tr. at 99-101, 108. We find that this information constitutes a sufficient basis under 10 C.F.R. § 2.309(f)(1)(ii). In this regard, contention SAFETY-1 is distinguishable from the LLRW contention in the Bellefonte COL proceeding, the admission of which the Commission recently reversed. See CLI-09-3, 69 NRC at __ (slip op. at 1). Unlike the contention admitted in the Bellefonte COL proceeding, which focused entirely on the regulations governing waste disposal, see id. at __ (slip op. at 5), contention SAFETY-1 concerns "how SNC will comply with NRC regulations governing storage and disposal of LLRW." Intervention Petition at 14 (emphasis added). Thus, as Joint Petitioners point out, their contention is based not only on the 10 C.F.R. Part 61 grounds rejected in Bellefonte but also on Parts 20 and 52. See Joint Petitioners Position Statement at 3. What the staff refers to as a "minor difference in wording," Staff Position Statement at 4, therefore distinguishes contention SAFETY-1 from the Bellefonte LLRW contention.[15] Though we conclude below that Joint Petitioners invocation of 10 C.F.R. Part 61, which governs waste disposal, is immaterial to this proceeding, we also find that contention SAFETY-1 is supported by an adequate alternative basis, namely 10 C.F.R. Parts 20 and 52.[16]

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[14] We note that neither SNC nor the staff objected at any point in the proceeding to Joint Petitioners having specifically cited section 52.79(a)(3) for the first time in their reply and, indeed, both SNC and the staff provide the same legal citation in support of their own arguments at the January 28, 2009 prehearing conference, see Tr. at 86, 93.

[15] We would add that we do not find our determination here inconsistent with the Commission's ruling in Bellefonte, in which the Commission stated "we do not rule out that, in a future COL proceeding, a petitioner could proffer an application-specific contention suitable for litigation on the subject of onsite storage of low-level radioactive waste." CLI-09-3, 69 NRC at __ n.42 (slip op. at 11 n.42).

[16] The Commission noted in reversing the Bellefonte Board's decision that "[w]e cannot (continued...)

Relative to 10 C.F.R. § 2.309(f)(1)(iv), both SNC and the staff assert that contention SAFETY-1 does not address an issue that is material to this proceeding because NRC regulations do not require a COL applicant to address long-term LLRW storage.[17] See Tr. at 86, 95-96. Joint Petitioners, on the other hand, argue that the requirement in 10 C.F.R. § 52.79(a)(3) for a COLA to address "[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in [10 C.F.R. Part 20]" means that an applicant must address long-term management of LLRW. See Joint Petitioners Reply at 10; Tr. at 99-101. While section 52.79(a)(3) does not explicitly speak to long-term storage of LLRW or any specific amount of waste storage, we do not see how, if offsite disposal for LLRW remains unavailable, a COL applicant could address compliance with 10 C.F.R. Part 20 limits in accordance with section 52.79(a)(3) without addressing what it intends to do with the LLRW (which certainly qualifies as radioactive material) expected to be produced in the operation of the proposed units. Thus, because an applicant's compliance with 10 C.F.R. § 52.79 is a material part of what the agency must assess in a COL proceeding, the question of how SNC

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[16](...continued)
tell from the Bellefonte decision which of the remaining grounds the Bellefonte Board was relying on." Bellefonte, CLI-09-3, 69 NRC at __ (slip op. at 6). This Board, by contrast, finds that Joint Intervenors have satisfied the basis requirement of 10 C.F.R. § 2.309(f)(1)(ii) by asserting that SNC's COLA fails to comply with the agency's regulations concerning LLRW storage, which, as we discuss below, are material to this proceeding. In addition, this contention, in contrast to one of the LLRW contentions under consideration in the Bellefonte proceeding, is a safety, as opposed to environmental, issue that places no reliance on Table S-3, 10 C.F.R. § 51.51(b), a reference the Commission found fatal to that Bellefonte contention's admissibility. See CLI-09-3, 69 NRC at __ (slip op. at 7-9).

[17] In this regard, SNC and the staff both argue that North Anna was wrongly decided. The North Anna Board explicitly found extended onsite storage of LLRW to be material to a licensing board's determinations under 10 C.F.R. Part 52, see North Anna, LBP-08-15, 68 NRC at __ (slip op. at 24).

intends to handle LLRW in the absence of an offsite disposal facility is material to the findings the agency must make.

To the extent, however, this contention raises the issue of SNC's future compliance with 10 C.F.R. Part 61, that portion of the agency's regulations is not material to this proceeding. See North Anna, LBP-08-15, 68 NRC at __ (slip op. at 26); Bellefonte, LBP-08-16, 68 NRC at __ (slip op. at 58); see also Bellefonte, CLI-09-3, 69 NRC at __ (slip op. at 5-6) (Part 61 inapplicable to onsite storage of licensee's own LLRW).

Additionally, both SNC and the staff argue that Joint Petitioners have not identified a genuine dispute with SNC on a material point of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi) because the information Joint Petitioners claim has been omitted is in fact in the COLA. See SNC Answer at 28-29, NRC Staff Answer at 41-45, Tr. at 87, 97. SNC and the staff point to a sentence in SNC's FSAR noting that "should disposal facilities not be available, the planned VEGP Units 1 and 2 Low Level Radwaste Storage Facility will be available to provide storage for VEGP Units 3 and 4." [SNC], Vogtle Electric Generating Plant, Units 3 & 4 COL Application, Part 2, Final Safety Analysis Report § 11.4.6.3, at 11.4-2 (rev. 0 Mar. 2008); see also SNC Answer at 28, NRC Staff Answer at 41. SNC and the staff further point to statements in the Supplement to the Generic Environmental Impact Statement (SGEIS) for the renewal of SNC's licenses for Vogtle Units 1 and 2 concerning the proposed new LLRW storage facility, see SNC Answer at 28-29, NRC Staff Answer at 42. In this regard, the Vogtle Units 1 and 2 SGEIS notes that SNC

> is developing several design concepts to provide for on-site low-level radioactive waste storage. One design concept being considered is to use a shielded storage pad with individual compartments for the placement of high integrity containers containing radioactive wastes. The shielding will be designed to ensure that the off site dose does not exceed any of the Federal limits specified in 10 CFR Part 20, as well as the Environmental

Protection Agency's (EPA) radiation standards in 40 CFR Part 190.

Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 34, Regarding Vogtle Electric Generating Plant, Units 1 and 2, NUREG-1437, at 2-14 (Supp. 34 Dec. 2008) (ADAMS Accession No. ML083380325). The Vogtle Units 1 and 2 SGEIS, in turn, references a series of internal SNC documents, including a document entitled Vogtle Electric Generating Plant -- Units 1&2: Conceptual Design for a Low Level Radwaste Pad at Plant Vogtle, which describes a possible design for the LLRW storage facility. See id.; Vogtle Electric Generating Plant -- Units 1&2: Conceptual Design for a Low Level Radwaste Pad at Plant Vogtle (Apr. 30, 2007) (ADAMS Accession No. ML073240581) [hereinafter Radwaste Pad Conceptual Design Memo].

None of this detail is included or explicitly referenced in the FSAR of the Vogtle Units 3 and 4 COLA. It is difficult to imagine how either a reviewer or a potential intervenor could know based on the FSAR to examine the environmental impact statements (as opposed to the safety-related documents) associated with the Vogtle Units 1 and 2 license renewal proceeding and from there find the April 2007 conceptual design documents. And the single sentence in the FSAR referring to the "planned VEGP Units 1 and 2 Low Level Radwaste Storage Facility," without more, would not seem to provide the level of detail necessary to determine whether SNC's plan for handling LLRW from proposed Vogtle Units 3 and 4 in the absence of an offsite disposal facility would comply with 10 C.F.R. Part 20 limits. Moreover, even if we accept that this reference would be enough to incorporate into the SNC COL FSAR the VEGP Units 1 and 2 life extension SGEIS discussion and the associated SNC storage study to which SNC and the staff refer us,[18] the discussion and analysis in both documents make it clear that what is being

[18] It also is not clear why, if the matter of LLRW storage sufficiency is significant enough to merit some staff discussion in the context of the Vogtle Units 1 and 2 renewal proceeding, it (continued...)

considered is no more than a "concept" that lacks SNC adoption as an actual plan for longer-term LLRW storage for the proposed Vogtle units.[19] Thus, Joint Petitioners raise a genuine dispute as to whether information on SNC's extended LLRW storage plan that should have been included has been omitted from the COLA for Vogtle Units 3 and 4.

We therefore admit this contention, as set forth in Appendix A,[20] as having satisfied the requirements of 10 C.F.R. § 2.309(f)(1).

III. PROCEDURAL/ADMINISTRATIVE MATTERS

In accord with the discussion above, Joint Petitioners are admitted as parties to this proceeding because they have established standing and have set forth at least one admissible contention. See 10 C.F.R. § 2.309(a)(1). Below is procedural guidance for further litigating the above-admitted contention.

Given there was no request in Joint Petitioners hearing petition pursuant to 10 C.F.R. § 2.309(g) to conduct this proceeding under the procedures for a formal hearing specified in 10 C.F.R. Part 2, Subpart G, unless all parties agree that this proceeding should be conducted pursuant to 10 C.F.R. Part 2, Subpart N, this proceeding will be conducted as an informal

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[18](...continued)
does not deserve equivalent treatment in the SNC COLA for Vogtle Units 3 and 4.

[19] In this regard, we note that the April 2007 analysis makes the observation that "[d]uring the design phase a [10 C.F.R. §] 50.59 evaluation will be required for the Low Level Radwaste Pad for Plant Vogtle." Radwaste Pad Conceptual Design Memo at 2. This not only emphasizes the preliminary nature of this potential SNC LLRW storage approach, but suggests that there may be somewhat more uncertainty associated with the need for agency approval of the design than SNC and staff counsel indicated during the January 28 oral argument. See Tr. at 89-90, 94-95.

[20] In admitting this contention, we reword it to ensure that the focus of any litigation is over the omission that is at the heart of Joint Petitioners concern, i.e., the failure to provide any detail concerning how SNC plans to handle extended onsite storage of LLRW from proposed Vogtle Units 3 and 4 in the absence of an offsite disposal facility.

hearing in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and L. Assuming all the parties currently do not consent to conducting this proceeding under Subpart N, the parties should conduct a conference within ten days of the date of this issuance to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of this proceeding and to make arrangements for the required disclosures under 10 C.F.R. §§ 2.336(a), (b), 2.1203.[21]

The Board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process to the maximum extent possible, with the understanding that failing to do so will result in appropriate Board sanctions.[22]

Pursuant to 10 C.F.R. § 2.332(d), the Board is to consider the staff's projected schedule for completion of its safety and environmental evaluations in developing the hearing

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[21] Among the items to be discussed is whether the staff's section 2.336(b) hearing file can be provided electronically via the NRC web site sooner than 30 days from the date of this issuance. In that regard, in accord with section 2.336(b), the staff should create an electronic hearing file. The staff shall make available to the parties and the Licensing Board a list that contains the ADAMS accession number, date and title of each item so as to make the item readily retrievable from the agency's web site, www.nrc.gov., using the ADAMS "Find" function. Additionally, the staff should create (or have created) a separate folder in the agency's Electronic Hearing Docket (EHD) associated with the Vogtle COL proceeding. Thereafter, the staff should provide notice to the other parties and the Licensing Board regarding the availability of the Hearing File materials in the EHD.

If the staff thereafter provides any updates to the hearing file, it should place a copy of those items in the hearing file portion of the Vogtle COL EHD folder and indicate it has done so in a notification regarding the update that is sent to the Licensing Board and the parties. Additionally, if at any juncture the staff anticipates placing any non-public documents into the hearing file for this proceeding, it should promptly notify the Licensing Board of that intent prior to placing those documents into the Vogtle COL EHD hearing file folder and await further instructions regarding those documents from the Licensing Board.

[22] In this regard, when a party claims a privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. The claim and identification of privileged materials must occur within the time provided for disclosing withheld materials. See 10 C.F.R. § 2.336(a)(3), (b)(5).

schedule. Accordingly, on or before Monday, March 16, 2009, the staff shall submit to the Board through the E-Filing system a written estimate of its projected schedule for completion of its safety and environmental evaluations, including but not limited to its best estimate of the dates for issuance of its open item and final safety evaluation reports and the draft and final environmental impact statements relative to Vogtle Units 3 and 4.

The Board will then conduct a prehearing conference to discuss initial discovery disclosures, scheduling, and other matters on a date to be established by the Board in a subsequent order. The parties should be prepared to address the following matters at the prehearing conference:

1. Estimates (discussed during their meeting) regarding when this case will be ready to go to hearing and the time necessary to try the admitted contention if it were to go to hearing.
2. Establishing time limits for updating mandatory disclosures under 10 C.F.R. § 2.336(d) and for updating the hearing file under 10 C.F.R. § 2.1203(c).
3. Whether their discussions regarding mandatory disclosures under 10 C.F.R. § 2.336 accounted for the disclosure of electronically stored information (ESI). See Fed. R. Civ. P. 16(b)(5), id. 26(a)(1)(B).
4. Whether any party intends to assert a privilege or protected status for any information or documents otherwise required to be disclosed herein and, if so, proposals for the submission of privilege logs under 10 C.F.R. § 2.336(a)(3), (b)(5), procedures and time limits for challenges to such assertions, and the development of a protective order and nondisclosure agreement.

5. Whether any of the parties anticipate submitting a motion for summary disposition regarding the admitted contention and the timing and page length of such a motion and responses thereto.

6. Establishing time limits for filing "timely" motions for leave to file new or amended contentions under 10 C.F.R. § 2.309(f)(2)(iii), and specifying pleading rules for motions for leave to file new or amended contentions that accommodate both 10 C.F.R. § 2.323 (motions and answers to motions) and 10 C.F.R. § 2.309(h) (answers and replies to contentions).

7. Establishing time limits for various evidentiary hearing-related filings, including:

   a. The final list of potential witnesses for each contention pursuant to 10 C.F.R. § 2.336(a)(1).

   b. Any motion for the use of Subpart G hearing procedures pursuant to 10 C.F.R. § 2.310(d).

   c. Any unanimous request, pursuant to 10 C.F.R. § 2.310(h), to handle the admitted contention under 10 C.F.R. Part 2, Subpart N.

   d. Any motion for cross-examination under 10 C.F.R. § 2.1204(b).

   e. The parties' initial written statements of position and written direct testimony with supporting affidavits pursuant to 10 C.F.R. § 2.1207(a)(1), along with consideration of (i) whether the parties should file simultaneously or sequentially, and, if sequentially, which party should file first; and (ii) the timing of filing of written responses, rebuttal testimony, and in limine motions relative to direct or rebuttal testimony.

8. The items outlined in 10 C.F.R. § 2.329(c)(1)-(3).

9. The possibility of settling the admitted contention, in whole or in part, including the status of any current settlement negotiations and the utility of appointing a settlement judge pursuant to 10 C.F.R. § 2.338(b).

10. Whether a site visit would be appropriate and helpful to the Board in the resolution of the contention.

11. Any other procedural or scheduling matters the Board may deem appropriate.

IV. CONCLUSION

For the reasons set forth above, we find that each of the organizations that constitute Joint Petitioners has established its standing to intervene and that they have put forth one litigable contention so as to be entitled to party status in this proceeding. The text of Joint Petitioners admitted contention is set forth in Appendix A to this decision.

For the foregoing reasons, it is this fifth day of March 2009, ORDERED, that:

1. Relative to the contentions specified in paragraph two below, Joint Petitioners hearing request is granted and those petitioners are admitted as parties to this proceeding.

2. The following Joint Petitioner contention is admitted for litigation in this proceeding: SAFETY-1.

3. The following Joint Petitioner contentions are rejected as inadmissible for litigation in this proceeding: MISC-1 and MISC-2.

4. The parties are to take the actions required by section III above in accordance with the schedule established herein.

5. In accordance with the provisions of 10 C.F.R. §§ 2.323(f), 2.341(f), and the discussion in section II.B.2.a. above, the Licensing Board refers its ruling regarding the admissibility of contentions MISC-1 and MISC-2 to the Commission.

6. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this memorandum and order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD[23]

/RA/
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/
James Jackson
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 5, 2009

[23] Copies of this memorandum and order were sent this date by Internet e-mail transmission and the agency's E-Filing system to counsel for (1) applicant SNC; (2) Joint Petitioners; and (3) the staff.

APPENDIX A

ADMITTED CONTENTION

1. SAFETY-1: LOW-LEVEL RADIOACTIVE WASTE STORAGE

   CONTENTION: SNC's COLA is incomplete because the FSAR fails to provide any detail as to how SNC will comply with NRC regulations governing storage of LLRW in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
SOUTHERN NUCLEAR OPERATING COMPANY	)	Docket No. 52-025-COL and 52-026-COL
	)	
(Vogtle)	)	
	)	
(Combined Operating License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON STANDING AND CONTENTION ADMISSIBILITY) (LBP-09-03) have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chair
E-mail: gpb@nrc.gov

Administrative Judge
Nicholas G. Trikouros
E-mail: ngt@nrc.gov

Administrative Judge
James F. Jackson
E-mail: jxj2@nrc.gov
jackson538@comcast.net

Law Clerk: Wen Bu
E-mail: wen.bu@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D-21
Washington, DC 20555-0001
Kathryn L. Winsberg, Esq.
Ann P. Hodgdon, Esq.
Sara Brock, Esq.
Patrick A. Moulding, Esq.
Sarah Price, Esq.
Carol H. Lazar, Esq.
Joseph Gilman, Paralegal
Emily Krause
E-mail: klw@nrc.gov
aph@nrc.gov; seb2@nrc.gov
patrick.moulding@nrc.gov, sap1@nrc.gov
jsg1@nrc.gov;Carol.Lazar@nrc.gov
Emily.Krause@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Moanica M. Caston, Esq.
Southern Nuclear Operating Company, Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B-022
Birmingham, AL 35201-1295
E-mail: mcaston@southernco.com

Kenneth C. Hairston, Esq.
M. Stanford Blanton, Esq.
Peter D. LeJeune, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2014
E-mail: kchairston@balch.com; sblanton@balch.com; plejeune@balch.com

Kathryn M. Sutton, Esq.
Steven P. Frantz, Esq.
Paul M. Bessette, Esq.
Diane A. Eckert, Admin. Assist.
Morgan, Lewis & Bockius, LLP
Co-Counsel for Southern Nuclear Operating Company, Inc.
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail: ksutton@morganlewis.com
sfrantz@morganlewis.com
pbessette@morganlewis.com
deckert@morganlewis.com

C. Grady Moore, III, Esq.
Balch & Bingham, LLP
1901 6TH Avenue, Suite 2600
Birmingham, AL 35203
E-mail: gmoore@balch.com

Atlanta Women's Action for New Directions (WAND), Blue Ridge Environmental Defense League (BREDL), Center for Sustainable Coast (CSC), Savannah Riverkeeper and Southern Alliance for Clean Energy (SACE)

Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
Lawrence Sanders, Esq.
E-mail: lsande3@emory.edu
Mindy Goldstein
E-mail: magolds@emory.edu

Robert B. Haemer, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122
E-mail: robert.haemer@pillsburylaw.com

Barton Z. Cowan, Esq.
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
E-mail: teribart61@aol.com

[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of March 2009