UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	**Docket No. 52-011-ESP**
Southern Nuclear Operating Company	)	**ASLBP No. 07-850-01-ESP-BD01**
(Early Site Permit for Vogtle ESP Site)	)	**February 7, 2007**

SOUTHERN NUCLEAR OPERATING COMPANY'S RESPONSE TO PETITIONERS' MOTION TO FILE SUPPLEMENTAL AUTHORITY

Southern Nuclear Operating Company ("SNC") hereby submits this Response to the February 2, 2007 JNT Motion to File Supplmental Auhtority [sic] (hereinafter, the "Motion").[1] Petitioners in this matter seek leave to file a copy of a recent decision of the United States Court of Appeals for the Second Circuit in the case styled, *Riverkeeper v. U.S. Environmental Protection Agency*, 2007 U.S. App. LEXIS 1642 (2d Cir. Jan. 25, 2007) ("*Riverkeeper II*").

Although the Board is free to consider the *Riverkeeper II* case as it deems appropriate,[2] Petitioners' Motion must be denied. As an initial matter, the pleading is comprised largely of argument, which is improper for notices of supplemental authority. *See, e.g.*, *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987) ("In making any [attempt to supplement its brief], a party is strictly forbidden from making additional arguments or from attempting to raise points clarifying its brief or oral argument."). While NRC's rules do not expressly address notices of supplemental authority, analogous federal rules of procedure provide that such notices should be

[1] Although the Motion was entitled as if submitted to the Secretary of the Commission, this response is being submitted to the ASLB in accordance with the Board's Order of February 3, 2007.

[2] It should be noted that the decision in *Riverkeeper II* will not become effective until the court's mandate issues, which has not yet occurred. *See* Fed. R. App. P. 41.

short and should simply "set[] forth the citation[]" and "state the reasons for the supplemental citation[]." Fed. R. App. P. 28(j).

Not only is the argument in the Motion well beyond the statement of relevance necessary to alert the Board to the existence of supplemental authority, the substance of the arguments in the Motion mischaracterized SNC's position regarding the Environmental Report's ("ER") analysis of impacts associated with the cooling water intake structures proposed for Vogtle Units 3 and 4. For example, Petitioners state erroneously that "SNC argues that that [sic] it need not analyze the impacts of the intake structure on aquatic species because it intends to comply with [the U.S. Environmental Protection Agency's ("EPA") Phase II 316(b) regulations]." Motion at 2. That is not an accurate characterization of SNC's position. *See* SNC's Answer in Response to Petition for Intervention at 16-23.

Regardless, pursuant to 10 C.F.R. § 2.323(b), the Motion must be rejected. The Motion does not include a certification to the effect that Petitioners have made a sincere effort to contact other parties in the proceeding to resolve the issues raised in the Motion, which is a prerequisite for filing a motion under 10 C.F.R. § 2.323.[3] Of course, SNC would have objected to the argument contained in the Motion.

In addition, Petitioners have misstated the relevance of *Riverkeeper II* to these proceedings, in at least two important respects. First, Petitioners argue that *Riverkeeper II* somehow deems all aspects of EPA's Phase II 316(b) regulations "invalid." Motion at 3. Specifically, Petitioners state that, as a result of *Riverkeeper II*, "SNC relies on an invalid regulation when it claims that EPA has already decided, by notice and comment rulemaking, that the type of cooling system technology proposed for the ESP facility is the best technology

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[3] Petitioners cite to 10 C.F.R. § 2.323(a) as authority for their Motion.

available." *Id*. at 3 (internal quotations omitted). However, the Second Circuit's decision in *Riverkeeper II* did not address EPA's selection of closed-cycle cooling as the best technology available for minimizing impingement and entrainment or EPA's evaluation of impacts from the use of closed-cycle cooling. Slip op. at 18-33. The parties in *Riverkeeper II* did not even challenge EPA's decision to establish closed-cycle cooling as the best technology available. Slip op. at 17. Instead, the parties in *Riverkeeper II* challenged the ability of facilities to forego installing closed-cycle cooling in favor of specified alternatives, such as wedgewire screens and barrier nets. *Id.* at 12, 17.

Second, Petitioners contend *Riverkeeper II* impeaches the adequacy of SNC's discussion of dry cooling in the ER. *See* Motion at 3. The Second Circuit actually said very little about dry cooling. If anything, *Riverkeeper II* bolsters EPA's decision to reject dry cooling as the best technology available for minimizing environmental impacts associated with cooling water systems. Slip op. at 23 n. 11.

CONCLUSION

Based on the foregoing, Petitioners' Motion to File Supplemental Authority should be denied.

Respectfully submitted,

[Original signed by M. Stanford Blanton]

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Dated this 7th day of February 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **SOUTHERN NUCLEAR OPERATING COMPANY'S RESPONSE TO JNT PETITIONERS' MOTION TO FILE SUPPLEMENTAL AUTHORITY** in the above captioned proceeding have been served by electronic mail as shown below, this 7th day of February 2007, and/or by e-submittal.

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