UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Before the Licensing Board:
G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James Jackson

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	**) November 23, 2007**

SOUTHERN NUCLEAR OPERATING COMPANY'S MOTION TO STRIKE OR IN THE ALTERNATIVE FOR LEAVE TO REPLY TO JOINT INTERVENORS' ANSWER OPPOSING SOUTHERN NUCLEAR OPERATING CO.'S MOTION FOR SUMMARY DISPOSITION OF ENVIRONMENTAL CONTENTION 1.3

M. Stanford Blanton, Esq. C. Grady Moore, III, Esq. BALCH & BINGHAM LLP 1710 Sixth Avenue North Birmingham, AL 35203-2015 Telephone: (205) 251-8100 Facsimile: (205) 226-8798 COUNSEL FOR SOUTHERN NUCLEAR OPERATING COMPANY	Kathryn M. Sutton, Esq. MORGAN, LEWIS & BOCKIUS LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004 Telephone: (202) 739-5738 Facsimile: (202) 739-3001 CO-COUNSEL FOR SOUTHERN NUCLEAR OPERATING COMPANY

Pursuant to 10 C.F.R. § 2.323(a), Southern Nuclear Operating Company ("SNC") moves to strike portions of the Joint Intervenors' Answer in Opposition to Southern Nuclear Operating Company's Motion for Summary Disposition on Joint Intervenors' Contention EC 1.3 ("Answer").[1] In the alternative, SNC moves for leave to reply to Joint Intervenors' ("Intervenors'") Answer in accordance with 10 C.F.R. § 2.323(c). As demonstrated below,

[1] The Joint Intervenors style their answer as opposing SNC's Motion to Dismiss as Moot or in the Alternative for Summary Disposition. Actually, SNC styled its filing as a Motion for Summary Disposition. Additionally, although the date on the caption of the answer reads "November 7, 2007," the Intervenors "respectfully submitted" the filing on November 13. Answer at 17.

Intervenors' Answer and attached Declaration of Mr. Powers ("Powers Declaration") raise new issues well beyond the scope of Contention EC 1.3 as admitted by the Board in this proceeding. Intervenors had an obligation to amend Contention EC 1.3 if they wished to raise these new issues. In addition, the Answer and the supporting declaration of Mr. Powers include assertions that are not admissible either because they mischaracterize the contents of written documents, and thus are not the best evidence of the contents of those documents, or are not a proper subject of opinion testimony under the Federal Rules of Evidence. Accordingly, the Board should strike portions of the Answer, the Powers Declaration and the Attachments to the declaration as described herein. In the alternative, Intervenors have raised issues and arguments that could not have been reasonably anticipated. 10 C.F.R. § 2.323(c) allows the moving party to reply, as permitted by the presiding officer, "in compelling circumstances, such as where the moving party demonstrates that it could not have reasonably anticipated the arguments to which it seeks leave to reply."

The undersigned certifies that he has consulted with counsel for Intervenors in accordance with 10 CFR § 2.323 (b) in an effort to resolve the issues raised by this Motion. Counsel for Intervenors has expressed agreement that Contention EC 1.3 involves only dry cooling, and not hybrid cooling, but otherwise indicated opposition to the Motion.

I. Intervenors' Attempt to Expand the Scope of EC 1.3 is Impermissible and any New Allegations Beyond the Scope Should be Stricken.

In order to defeat a motion for summary disposition under the NRC's rules of practice and applicable case law, a party must establish through evidence that there are genuine issues of material fact that require an evidentiary hearing in order to be resolved. *See, e.g., Advanced Medical Systems, Inc.*, (One Factor Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). It is well-established that, a party may not expand the scope of the contention in order to

oppose the motion for summary disposition without first following the procedural requirement to file an amended contention. *See, e.g., Exelon Nuclear Generation Co. and Entergy Operations, Inc.,* (Pilgrim Nuclear Power Station,) LBP 07-13, 66 NRC __ (October 30, 2007) (slip op. at 16).; *In the Matter of Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163 (2001) (finding that Intervenor can only raise new arguments regarding the adequacy of DEIS analysis by filing new or amended contentions). For instance, in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), the Board had admitted a contention based on Duke Cogema's ("DCS") initial application, but DCS then revised the application. LBP-04-9, 59 N.R.C. 286 (2004). DCS subsequently filed a motion for summary disposition. In response, the Intervenor challenged new information that was part of DCS' *revised application*. The Board granted summary disposition, finding that the intervenor "should have been well aware of the Board's expectation that late-filed contentions or *late-filed amended contentions* should be filed promptly following the issuance of any documents containing significant new or different information." *Id.* at 292. Intervenors' Answer to the Motion for Summary Disposition raises new issues that are neither within the scope of the admitted contention nor the subject of an amended or supplemental contention. The new issues should be stricken.

A. *Intervenors' new assertion regarding the feasibility of a hybrid wet-dry cooling system should be stricken.*

EC 1.3 deals solely with the ER's, and now the DEIS', analysis of dry cooling as an alternative to the closed cycle wet cooling option evaluated in the ER and the DEIS. The Board characterized Intervenors' contention as "whether SNC has provided an adequate analysis of dry cooling as an alternative cooling system for the proposed Vogtle facilities." ASLB Order at 19. As noted above, counsel for Intervenors agrees that the scope of EC 1.3 is limited to dry cooling.

Nevertheless, in their Answer, for the first time, Intervenors argue the feasibility of a hybrid wet and dry cooling system as a basis for a dispute of fact over whether dry cooling is a feasible cooling alternative for a large triple pressure steam turbine operating in southern Georgia. *See* Answer, Statement of Genuine Issues of Disputed Fact, ¶¶ 7, 25. Intervenors should not be allowed to convert their contention regarding dry cooling into one regarding hybrid cooling in the context of an Answer to the Motion for Summary Disposition.

In particular, in their opposition to Statement of Undisputed Facts 12, and in the corresponding paragraph 15 of the Powers Declaration, the Intervenors argue that "Dominion Resources is proposing a parallel dry-wet cooling system for reactor 3 and dry-cooling system in reactor 4 at their North Anna plant in Virginia." In their opposition to Statement of Undisputed Facts 12-13, 16 and 24- 26, citing the Powers Declaration, Intervenors argue that a hybrid cooling system would not suffer the efficiency loss Mr. Cuchens claims for a dry system. In their opposition to Undisputed Statement of Facts 18 and the Powers Declaration ¶ 12, the Intervenors argue that "[t]here are alternative designs to dry-cool that would reduce land requirements, such as a parallel dry-cooling tower."

Finally, in their Opposition to Statement of Undisputed Facts 25 and 26 and the Powers Declaration at paragraphs 9 and 20, the Intervenors change their earlier position in favor of a dry cooling system and now advocate for hybrid cooling. The Intervenors concede SNC's arguments against a dry system in those Undisputed Facts and state that "[t]he parasitic load for a dry cooling system could largely be eliminated by utilizing a parallel dry-wet cooling system similar to the one Dominion Resources is proposing for North Anna 3 nuclear reactor in Virginia." The assertion that the ER or the DEIS should have evaluated hybrid or wet-dry cooling could have been made based on the ER, and certainly could have been raised as an amended or supplemental

contention after the issuance of the DEIS. Intervenors should not be allowed to expand the scope of EC 1.3 by raising it for the first time in response to Applicant's motion. The Board should strike paragraphs 9, and 20 of the Powers Declaration and those portions of the Answer that argue that the hybrid or wet-dry cooling systems are a basis for a genuine dispute of fact relative to EC 1.3, including but not limited the portions of paragraphs 12-13, 16, 18 and 24-26 of the Statement of Genuine Issues of Material Fact in Dispute, as indicated on Attachment A.

B. *Intervenors' new allegations challenging the adequacy of the DEIS analysis should be stricken.*

Contention EC 1.3 was admitted based on the Board's observation that it was at least "arguable" that dry cooling should be analyzed in more detail than as set forth in the ER if "the Vogtle site contains … extremely sensitive natural resources." ASLB Order at 20 (emphasis added). Accordingly, the Board admitted EC 1.3 based on a purported absence of "analysis as to whether, considering the present sensitive species and other pertinent factors, dry cooling is appropriate for the Vogtle site." ASLB Memorandum and Order (Ruling on Standing and Contentions) at 20 (March 12, 2007) (emphasis added). The contention is, therefore, based on the alleged lack of detailed analysis of dry cooling in the ER, rather than the validity or accuracy of the information or conclusions presented, and therefore is properly characterized as a contention of omission. Importantly, the Intervenors did not amend or supplement their contention to challenge the adequacy of the analysis of dry cooling in the DEIS.[2] ASLB Memorandum and Order (Ruling on Standing and Contentions) at 18 – 21.

In their Answer, the Intervenors acknowledge that "E.C. 1.3 established that the record

[2] The NRC Staff likewise considered the contention one of omission. In its response in support of the motion for summary disposition, the NRC Staff describes, "EC 1.3 [a]s a contention of omission, as it challenges the ER for failing to consider the presence of sensitive biological resources in the analysis of a dry cooling system as a system design alternative." Response of NRC Staff to Southern Nuclear Operating Company's Motion for Summary Disposition of Contention EC 1.3 at 5.

was not adequate as '[t]he ER fails to satisfy 10 C.F.R. § 51.45(b) (3) because it *fails to address* impacts to aquatic species in its discussion of alternatives. In particular, the ER's discussion of the no-action alternative and of alternative cooling technologies *fails to consider* environmental and economic benefits of avoiding construction of the proposed cooling system.'" Answer at 16 (emphasis added). The admitted contention did not question either the accuracy of the analysis in the EPA rulemaking or that the findings in that rulemaking were applicable to VEGP. *See* ASLB Order on Contentions at 18-21.

Faced now with SNC's and NRC staff's argument that the DEIS satisfies any alleged omission of dry cooling analysis in the ER, the Intervenors' Answer impermissibly attempts to convert the contention into one challenging the adequacy of the analysis in the DEIS. For example, the Answer challenges the conclusions in the DEIS that dry cooling would have environmental impacts, create noise pollution and spent nuclear fuel, and require additional land as "erroneous." Answer, Statement of Genuine Issues of Disputed Fact ¶ 25-27. The Answer goes further and challenges the accuracy of the analysis in the DEIS of the "parasitic load" requirements, the land use impacts, and the generation output losses that would be caused by a dry cooling system. *Id*.

To the extent Intervenors dispute the findings of the NRC staff in the DEIS, the proper vehicle for raising those challenges would have been an amendment or supplement to the contention. Intervenors chose not to do so. Intervenors' new allegations regarding the adequacy of the analysis in the DEIS are outside the scope of EC 1.3 and it is not permissible to raise them in the context of responding to SNC's motion for summary disposition. Therefore, SNC moves the Board to strike the portions of paragraphs 24, 25, 26 and 27 of the Statement of Genuine Issues of Material Facts in Dispute in Intervenors' Answer, as indicated on Attachment A.

II. The Declaration of Intervenors' Witness Powers Includes Assertions That Are Not Admissible to Create an Issue of Fact and Those Portions Should be Stricken.

Facts submitted in the opposition to a motion for summary judgment in the form of expert testimony are admissible only if "the affiant is competent to give an expert opinion and only if the factual basis for that opinion is adequately stated and explained in the affidavit." See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fabrication Facility), LBP – 05-04, 61 NRC 71, 80-81 (2005). A proffered declaration that is not supported by the facts or that constitutes "subjective belief or unsupported speculation is not sufficient to create a genuine dispute of material fact. *Id.* The affidavit of Mr. Powers, submitted by Intervenors in support of their Answer, violates these principles in a number of respects.

A. *Powers' assertion that Cuchens analyzed a 230 Module ACC system mischaracterizes Cuchens' testimony, is unsupported, and should be stricken.*

The Board should also strike as inadmissible the Intervenors' assertions that the Affidavit and Report of James W. Cuchens submitted with the Motion for Summary Disposition is contradictory because it analyzes a smaller dry cooling system than that upon which Mr. Cuchens' opinion is based. The Intervenors' Answer states: "Only 230 modules would be required. *Cuchens affidavit (14-15) identifies an ACC system composed of 230 modules at the cost of $200 million. . . . . No reason is given by Mr. Cuchens as to why the 230 ACC module [sic] is excluded from his feasibility study in favor of the larger, costlier design with no discernable advantage*." Answer, Statement of Genuine Issues of Material Fact in Dispute ¶ 19 (emphasis added). Again in their Answer at ¶ 22, Intervenors repeat that:

> *Cuchens initially identifies a 230 module system at the cost of $200 million.* Yet the cooling cost study consists of 334 modules at a cost of $361 million. Powers Declaration ¶ 14. "It makes no sense to build a 334 module ACC that costs $361 [million] and has a 44 MW parasitic fan load, when a 230 module ACC with 30 MW parasitic fan load would have the same results." Powers Declaration ¶ 5. Essentially, Mr. Cuchens has ramped up the size and load of the dry-cool option, increasing fiscal and environmental costs and impacts to the dry-cool alternative. This is unreasonable *as Cuchens already identified a feasible dry-cool system that was smaller and cheaper.*

(emphasis added) *See also Id*. at ¶ 23 *("*Though Cuchens initially proposes a 230 ACC module system costing $200 million (pp 14-15), he assumes a 360 ACC modules system costing $361 million in his feasibility study.")

Neither the pages of the Cuchens report cited by Intervenors, nor any other page of the Report, discuss or contain a reference to a 230 ACC module system relative to the AP1000 plant. *See* Cuchens Affidavit, Exhibit 1, at 14-15. Saying it does, no matter how many times, does not make it so. In fact, the Cuchens Affidavit nowhere "identified" the option of a 230 module dry cooling system. The unsupported and plainly inaccurate statements attributed to Mr. Cuchens in Mr. Powers' affidavit are neither the best evidence of Mr. Cuchens' analysis nor are they admissible to create a genuine issue of fact regarding the size, cost and environmental impact of a dry cooling system for an AP1000 power plant. See Duke Cogema Stone & Webster, 61 NRC at 80-81. The Board should strike the italicized sentences and the paragraphs 14, 15, and 18 of the Powers Declaration together with paragraphs 19, 22, 23, 25 and 27 of the Answer, Statement of Genuine Issues of Material Fact in Dispute, as indicated in Attachment A, because the best evidence of what is in Mr. Cuchens report is the report itself, and not Mr. Powers' misleading

statements about the report. [3] *See* In the Matter of Georgia Institute of Technology (Georgia Tech Research Reactor), 43 NRC 231, 233 (1996).

B. *Powers' assertion that dry cooling would not require significant changes to the turbine building is not supported and therefore should be stricken.*

The Intervenors also proffer Mr. Powers' Declaration in an effort to create a genuine issue of material fact regarding the extent of the changes to the turbine building that would be necessary in order for it to accommodate an air-cooled condenser. *See* Intervenors Answer, Intervenors Statement of Genuine Issues of Material Fact in Dispute, para. 8. The Intervenors' cite Mr. Powers' affidavit for several assertions regarding the extent and difficulty of the design changes without any factual predicate to suggest that Mr. Powers has either studied the design of the AP1000 turbine building or what the design and operating characteristics of his hypothetical air-cooled condenser are. Without such a factual predicate, his assertions are not admissible to create a genuine issue of disputed fact. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fabrication Facility), LBP – 05-04, 61 NRC 71, 80-81 (2005) (factual basis for expert opinion must be adequately stated and explained in the affidavit). Accordingly, SNC moves to strike paragraphs 7, 11 and 16 of the Powers Declaration and paragraphs 20-21 and 23 of the Intervenors' Answer, Statement of Genuine Issues of Material Fact in Dispute, as indicated in Attachment A.

3.The Intervenors' Answer and Mr. Powers' Declaration also contain assertions relative to the scope of the AP1000 standard design and relative to other generating units that employ dry cooling that SNC believes are clearly inconsistent with the AP1000 Design Control Document and with Energy Information Administration Reports regarding one of the generating facilities referenced by Mr. Powers. Because Intervenors' have agreed to the supplementation of the record with these documents so that the Board can ascertain the undisputed facts regarding these issues without reference to affidavits from either side, SNC has not filed a motion to strike with reference to those assertions. Contemporaneously with this Motion to Strike, SNC is submitting a Motion to Supplement the Record with these materials. The assertions regarding these matters, included in paragraphs 7, 10 and 12 of his Declaration, cannot create a genuine issue of fact to the extent that they merely contradict these official documents without explanation.

III. ALTERNATIVE REQUEST FOR LEAVE TO REPLY

If the Board elects not to strike the provisions set forth above, in the alternative, SNC respectfully requests an opportunity to file a reply to the Joint Intervenors' Answer pursuant to 10 C.F.R. § 2.323(c).

IV. CONCLUSION

The Board should strike the portions of the Intervenors' Answer and supporting documents as SNC specified in this motion or in the alternative grant SNC's request for leave to file a reply.

Respectfully submitted,

(Original signed by M. Stanford Blanton)

M. Stanford Blanton, Esq.
C. Grady Moore, III, Esq.
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2015
Telephone: (205) 251-8100
Facsimile: (205) 226-8798

COUNSEL FOR SOUTHERN NUCLEAR OPERATING COMPANY

Kathryn M. Sutton, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-5738
Facsimile: (202) 739-3001

CO-COUNSEL FOR SOUTHERN NUCLEAR OPERATING COMPANY

Dated this 23rd day of November, 2007.

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

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

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)	)	**November 23, 2007**

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S MOTION TO STRIKE OR IN THE ALTERNATIVE FOR LEAVE TO REPLY TO JOINT INTERVENORS' ANSWER OPPOSING SOUTHERN NUCLEAR OPERATING CO.'S MOTION FOR SUMMARY DISPOSITION OF ENVIRONMENTAL CONTENTION 1.3 in the above captioned proceeding have been served by electronic mail as shown below, this 23rd day of November, 2007, and/or by e-submittal.

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(Email: gpb@nrc.gov)

Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ngt@nrc.gov)

Administrative Judge
Dr. James Jackson
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: jackson538@comcast.net)

Office of the Secretary
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Margaret Parish
Law Clerk
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
(E-mail: map4@nrc.gov)

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

Brooke D. Poole, Esq.
Jonathan M. Rund, Esq.
Tison A. Campbell, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(E-mail: bdp@nrc.gov, jmr3@nrc.gov, tac2@nrc.gov)

Mary Maclean D. Asbill, Esq.
Lawrence D. Sanders, Esq.
Turner Environmental Law Clinic
Emory University School of Law
(E-mail: masbill@law.emory.edu lsanders@law.emory.edu)

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street, NW
Suite 600
Washington, D.C. 20036
(E-mail: dcurran@harmoncurran.com)

(Original signed by M. Stanford Blanton)

_____

M. Stanford Blanton
Counsel for Southern Nuclear Operating Co.