

December 6, 2007

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board
G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James Jackson

_____)	
In the Matter of)	
)	
SOUTHERN NUCLEAR OPERATING)	Docket No. 52-011-ESP
COMPANY)	
)	
(Early Site Permit for the Vogtle ESP Site))	
_____)	

**INTERVENORS’ ANSWER OPPOSING NRC STAFF AND SNC MOTIONS TO
STRIKE PORTIONS OF JOINT INTERVENORS’ ANSWER OPPOSING SUMMARY
DISPOSITION OF ENVIRONMENTAL CONTENTION 1.3**

In accordance with 10 CFR §2.323(c), Intervenor hereby submit this response opposing motion by Southern Nuclear Operating Company (“SNC”) to Strike Portions of Joint Intervenor’s Answer in Opposition to SNC’s Motion for Summary Disposition on Environmental Contention 1.3 (“SNC Motion”). Additionally, Intervenor submit this response opposing NRC Staff’s Motion to Strike Portions of Joint Intervenor’s Answer Opposing Summary Disposition of EC 1.3 (“Staff Motion”). As shown below, the Intervenor’s Answer in Opposition to SNC’s Motion for Summary Disposition on EC 1.3 (“Answer”) and attachments are admissible in their entirety. Contrary to assertions by SNC and Staff, Intervenor’s Answer does not expand the scope of Environmental Contention 1.3 (“E.C. 1.3”). Rather, the Intervenor’s Answer and attachments constitute an admissible response to SNC’s Motion for Summary Disposition of EC 1.3 pursuant to 10 CFR §2.1205(b) and 10 CFR §2.710.

DISCUSSION

Intervenors acknowledge that EC 1.3, as admitted, refers specifically to “dry cooling.” See SNC Motion at 3; Staff Motion at 4. As the Board recognized in its order admitting EC 1.3., Intervenors’ “primary” argument “challenges whether SNC has provided an adequate analysis of dry cooling as an alternative cooling system for the proposed Vogtle facilities.” *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-03, 65 NRC 237, 2__ (2006). Nevertheless, Intervenors oppose the motions to strike because, the offending material in the Answer and supporting affidavit responds to new information and arguments offered by SNC in support of summary disposition. Moreover, Intervenors question both the necessity to strike anything from the record and the practical effect of granting such a motion.

A. The Motions to Strike Serve No Legitimate Purpose and Should Be Denied

To Intervenors, it is unclear the practical effect of granting a motion to strike portions of an answer opposing summary determination, or the need to “strike” anything from the record in this matter. As the Staff recognizes in its brief, “the granting of this motion will not result in the actual expungement of material from the record because it could become relevant in a subsequent appeal.” Staff Motion at 4. Instead, in ruling on the SNC Motion for Summary Disposition, the Board would simply “not consider any information that would be inappropriate under relevant law.” *PPL Susquehanna LLC* (Susquehannah Steam Elec. Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301 n. 86 (2007); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

The Board’s decision on a motion for summary judgment must be based on “the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any.” 10 C.F.R. § 2.710(d)(2). Assuming that

SNC and the Staff are correct that the Answer does go impermissibly beyond the scope of EC 1.3, the Board is not permitted to consider such materials in making a decision. With or without a motion to strike, Intervenors are confident in the Board's ability to render a decision based only upon admissible evidence and to reject any arguments that exceed the scope of EC 1.3. As a result, the motions are unnecessary and have no real effect on the outcome of the proceedings.

The motions to strike do not actually contemplate anything being stricken from the record, but instead function as a vehicle for SNC and the Staff to present additional arguments responding to the Answer. Thus, the briefs are more akin to a reply brief than a motion to strike. *Cf. Duke Cogema Stone & Weber* (Savannah River Mixed Oxide Facility), LBP-04-9, 61 NRC 71, 76 (2005) (describing process for submitting a reply to an answer to summary disposition motion). However, the NRC Rules of Practice do not contemplate a reply brief in summary disposition proceedings. *See* 10 C.F.R. § 2.710(a)(After answer is filed, “no further supporting statements or responses thereto will be entertained.”) ¹ Nothing is actually accomplished by the motions to strike, other than providing SNC and Staff an opportunity to submit additional argument to the Answer without first obtaining the Board's leave to file a reply. *See* 10 C.F.R. § 2.323(c)(“The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer.”).

B. Joint Intervenors' Answer And Attachments Are Within the Scope of EC 1.3 and Admissible in Their Entirety.

Although the language of EC 1.3 refers specifically to “dry cooling,” it does not necessarily follow that hybrid wet/dry cooling systems are outside the scope of the admitted

¹ Perhaps in recognition of the fact that its motion is not actually a motion to “strike,” SNC alternatively styles its motion as a motion for leave to reply to Joint Intervenors' Answer in accordance with 10 C.F.R. § 2.323(c). Such leave is available “only in compelling circumstances.” 10 C.F.R. § 2.323. By providing its argument in reply along with its motion, SNC defeats the purpose of the rule's requirement of seeking prior leave of the Board before submitting a reply.

contention. Nor is it apparent that the term “dry cooling” in EC 1.3 excludes cooling systems that employ varying degrees of dry cooling. The term, “dry cooling” is not defined in a Commission regulation or in the Board’s Order admitting EC 1.3, nor is its meaning entirely apparent. In the context of a contention alleging that the ER “fails to satisfy 10 C.F.R. § 51.45(b)(3) because its analysis of the dry cooling alternative is inadequate to address the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources,” the references to hybrid and parallel wet/dry cooling systems is appropriate and understandable. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), 65 NRC at 280.

The ER’s discussion of the dry cooling alternative consists of a single paragraph dismissing dry cooling “for the reasons discussed in EPA’s preamble to the final rule addressing cooling water intake structures for new facilities (66 FR 65256; December 18, 2001).” ER at 9.4-2. This discussion is followed by an equally brief discussion dismissing “wet dry cooling towers.” *Id.* On the other hand, the DEIS combines the discussion of “Dry or Hybrid Wet/Dry Cooling Towers” into a single section of the document. DEIS § 9.3.2. In terms of substantive content, the analysis of dry cooling and hybrid wet/dry cooling is nearly identical in both the ER and DEIS. Clearly, dry cooling and wet/dry cooling are related topics that are treated by the Staff as a single subject in the DEIS.

Industry literature discussing different dry cooling systems, submitted with Intervenors’ Answer, also treats parallel wet/dry condensing systems as a species of dry cooling. *See* Affidavit of Bill Powers, Attachment F. Similarly, in its Statement of Undisputed Facts accompanying the Motion for Summary Disposition, SNC notes that the Staff concludes that a wet cooling tower system is preferable to either a dry or hybrid wet/dry cooling system for

VEGP Units 3 and 4. SNC Statement of Undisputed Facts in Support of Summary Disposition of EC 1.3. So, in its Motion for Summary Disposition, SNC asserts that wet cooling is preferable to “either” dry or hybrid cooling systems. *Id.*

Dry cooling and wet/dry cooling are considered together in the ER, the DEIS, the industry literature, and SNC’s Statement of Undisputed Facts supporting the Motion for Summary Disposition. Therefore, Intervenor’s expert understandably includes limited discussion hybrid and parallel wet/dry systems in his affidavit in opposition to summary disposition. References to dry hybrid and parallel wet/dry cooling systems in the Answer and supporting affidavit are within the scope of the admitted contention.

Under the NRC Rules of Procedure, the party opposing summary disposition may “respond in writing to new facts and arguments presented in any statement filed in support of the motion.” 10 C.F.R. §§ 2.710(a); 2.1205(c). With its Motion for Summary Adjudication, SNC submitted new information in the form of an affidavit and analysis. *See* Affidavit of James W. Cuchens. This new information purports to show that the ER (now DEIS) adequately addresses the appropriateness of a dry cooling system, and therefore complies with the Commissions’ NEPA regulations codified at 10 C.F.R § 51.45(b)(3). *See also* 10 C.F.R. § 51.71 (discussing contents of DEIS). In response to the new information and arguments presented in support of summary disposition, Intervenor engaged an expert in cooling technology for power plants, Bill Powers. In the course of his review of the ER, DEIS, Motion for Summary Disposition, and Cuchens affidavit, Mr. Powers developed an opinion, which is expressed in his declaration. Mr. Powers’ affidavit includes several references to parallel and hybrid wet/dry cooling which respond to the claims in the Motion for Summary Adjudication and supporting affidavits.

C. The Affidavit of Bill Powers and Information Contained Therein Meet the Standards for Admissibility of Evidence in NRC Proceedings

Contrary to SNC's claim, the affidavit of Bill Powers presents specific and credible information demonstrating there are material issues of fact in dispute. *See* 10 CFR §2.710(b). Summary disposition is inappropriate where there is disagreement among competing experts. Instead, the Board must determine "which experts are more correct" in a forum where competing facts are considered and weighed, not in a summary proceeding. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fabrication Facility) LBP-05-04, 61 NRC 71, 80-81.

In *Duke Cogma*, the Board held that admissibility of an affidavit is determined by the competence of the expert and upon the adequacy of the statement and explanation of the factual basis for their opinion. *Id.* The Board determined that an expert affidavit was inadmissible because the analysis relied on "bare assertions and general denials." *Id.* at 50. SNC errs in its attempt to draw a parallel between *Duke Cogma* and this case.

The expert in *Duke Cogema* relied on assumptions, conjecture and "educated guesses" to substantiate a theoretical risk model advanced in his affidavit. *Id.* In this case, however, the portions of the Powers' Affidavit challenged by SNC are supported by concrete factual bases. Mr. Powers backs up his conclusions regarding dry-cooling feasibility with tangible, publicly available facts regarding turbine design at North Anna and Palo Verde power stations. *See* Powers' Declaration, ¶¶9, 20. Mr. Powers' assertions regarding "standard design" are clearly presented with diagrams of the turbine building and a detailed explanation of why, where and how modifications would have to be made to the proposed design. *See Id.* ¶¶ 7, 11, 16. With regard to Mr. Powers' critique of the cooling system size postulated by SNC, he relies on inconsistencies contained in SNC's own statement and supporting documents, to reconcile discrepancies and to base his opinion upon. *Id.* ¶¶15,18.

SNC does not demonstrate that Mr. Powers' testimony is supported by subjective belief or unsupported speculation. To the contrary, the affidavit is substantiated with factual support. Beyond the mere allegations and denials asserted by SNC, however, there is little factual basis to support its motion to strike Powers' Declaration. Given the factual support contained in Mr. Powers' affidavit, the Board should conclude that it meets the standards for admissibility in NRC proceedings. Rather than disregard to expert opinion presented in Intervenors' opposition to summary disposition, the Board must examine the record in a light most favorable to the opposing party. The Board should reject SNC's invitation to evaluate "which expert is most correct" in the context of summary disposition. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001); *Public Service Co. of New Hampshire*, LBP-86-30, 24 NRC 437. To the extent that SNC disagrees with the Powers affidavit, it demonstrates a dispute of material facts that precludes summary disposition.

CONCLUSION

Intervenors' Answer and supporting affidavit are both permitted by the NRC Rules of Procedure and within the scope of contention EC 1.3. As a practical matter, the motions to strike serve no purpose because the contested material will not actually be stricken from the record even if the Board grants it. Therefore, the Board should deny the motions to strike.

Respectfully submitted this 6th day of December, 2007,

[Signed by L. Sanders]

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INTERVENORS' ANSWER IN RESPONSE TO SNC AND NRC STAFF MOTIONS TO STRIKE PORTIONS OF INTERVENORS' ANSWER TO MOTION FOR SUMMARY DISPOSITION OF EC 1.3** have been served upon the following persons by Electronic Information Exchange and/or electronic mail.

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Dated this 6th day of December, 2007

[Original signed by L. Sanders]

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