

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
SOUTHERN NUCLEAR OPERATING)
COMPANY) Docket Nos. 52-025 and 52-026
)
Vogtle Electric Generating Plant)
(Units 3 and 4))

NRC STAFF ANSWER TO "PETITION FOR INTERVENTION"

Ann P. Hodgdon
Sarah W. Price
Carol H. Lazar
Counsel for NRC Staff

December 12, 2008

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	1
DISCUSSION.....	3
I. LEGAL STANDARDS.....	3
A. Standing to Intervene.....	3
B. Legal Requirements for Contentions	6
II. STANDING.....	9
A. Standing of Atlanta Women’s Action for New Direction (“Atlanta WAND”).....	11
B. Standing of Blue Ridge Environmental Defense League (“BREDL”).....	10
C. Standing of Center for a Sustainable Coast (“CSC”).....	15
D. Standing of Savannah Riverkeeper	21
E. Standing of Southern Alliance for Clean Energy (“SACE”).....	22
III. PETITIONERS’ PROPOSED CONTENTIONS	23
A. Petitioners’ First Proposed Contention	20
1. Proposed Contention MISC-1 Does Not Demonstrate a Material Dispute with the Applicant.....	24
2. Proposed Contention MISC-1 Challenges NRC Regulations	30
3. Conclusion	34
B. Petitioners’ Second Proposed Contention	34
1. Proposed Contention MISC-2 Challenges NRC Regulations	35
2. Proposed Contention MISC- 2 Does Not Demonstrate a Material Dispute with the Applicant.....	38
3. Conclusion	39
C. Petitioners’ Third Proposed Contention	40

1.	Proposed Contention SAFETY-1 is Inadmissible Because It Erroneously States That the FSAR Fails to Explain the Waste Management Actions SNC Will Take in the Absence of An Offsite Disposal Facility	41
2.	Proposed Contention SAFETY-1 Distorts the Meaning of the Term “Disposal” as Used in Section 11.4.6 of the FSAR.....	45
3.	Proposed Contention SAFETY-1 Incorrectly Assumes the FSAR Must Include a Separate Discussion of Health Impacts of LLRW Storage on SNC Employees	46
4.	Conclusion	49
CONCLUSION		49

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
SOUTHERN NUCLEAR OPERATING)
COMPANY) Docket Nos. 52-025 and 52-026
)
Vogtle Electric Generating Plant)
(Units 3 and 4))

NRC STAFF ANSWER TO "PETITION FOR INTERVENTION"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission ("Staff") hereby answers the "Petition for Intervention" (Petition) filed on November 17, 2008 by Atlanta Women's Action for New Directions (Atlanta WAND), Blue Ridge Environmental Defense League (BREDL), Center for a Sustainable Coast (CSC), Savannah Riverkeeper, and Southern Alliance for Clean Energy (SACE) (collectively, Petitioners). For the reasons set forth below, the Staff does not oppose the standing of the five groups petitioning to intervene, but opposes admission of the Petitioners as parties, since the Staff opposes the admission of all three of the Petitioners' proposed contentions.

BACKGROUND

On March 31, 2008, the Southern Nuclear Operating Company (SNC, the Applicant) filed with the NRC an application for a combined license (COL) for Vogtle Electric Generating Plant Units 3 and 4.¹

¹ See Southern Nuclear Operating Company; Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 24,616 (May 5, 2008). The NRC docketed the application on May 30, 2008. See Southern Nuclear Operating Company; Acceptance for Docketing of an Application for Combined License for Vogtle Electric Generating Plant Units 3 and 4, 73 Fed. Reg. 33,118 (June 11, 2008).

The application for a COL for Vogtle Units 3 and 4 (Application) references the design certification amendment to the previously certified Westinghouse AP1000 (AP1000) design (see 10 C.F.R. Part 52, Appendix D). Revision 17 of the AP1000 design certification amendment was published on the NRC public website on November 25, 2008, and is now under NRC staff review.²

On September 16, 2008, the NRC published a notice of hearing on the Application, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. See Southern Nuclear Operating Company; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for Vogtle Electric Generating Plants Units 3 and 4, 73 Fed. Reg. 53,446 (Sept. 16, 2008).

In response to the Notice of Hearing, Petitioners submitted their Petition through which they seek to intervene in this proceeding.

² See <http://adamswebsearch2.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML083230868>.

DISCUSSION

I. LEGAL STANDARDS

A. Standing to Intervene

In accordance with the Commission's Rules of Practice:³

[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing.

10 C.F.R. § 2.309(a). The regulations further provide that the Licensing Board: will grant the request [petition] if it determines that the requestor [petitioner] has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)]. *Id.*

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended (Act)] to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/ petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/ petitioner's interest.

10 C.F.R. § 2.309(d)(1).

³ See "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," 10 C.F.R. Part 2.

As the Commission has observed:

[a]t the heart of the standing inquiry is whether the petitioner has 'alleged such a personal stake in the outcome of the controversy' as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994), citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

To demonstrate such a 'personal stake,' the Commission applies contemporaneous judicial concepts of standing. Accordingly, petitioner must (1) allege an 'injury in fact' that is (2) 'fairly traceable to the challenged action' and (3) is 'likely' to be 'redressed by a favorable decision.

Sequoyah Fuels, CLI-94-12, 40 NRC at 71-72, citing *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). See also *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

In reactor license proceedings, licensing boards have typically applied a "proximity" presumption to persons "who reside in or frequent the area within a 50-mile radius" of the plant in question. See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001).⁴ The Commission noted this practice with approval, stating that:

We have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto[.] See, e.g. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). . . . [T]hose cases involved the construction or

⁴ The *Turkey Point* decision summarizes the development of this doctrine. See *Turkey Point*, LBP-01-6, 53 NRC at 147-48.

operation of the reactor itself, with clear implications for the offsite environment[.] See, e.g., *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 [sic, 7] AEC 222, 226 1974).

Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). The proximity presumption establishes standing without the need to establish the elements of injury, causation, or redressability. *Turkey Point*, LBP-01-6, 53 NRC at 150.

The Staff submits that since a COL application is an application for a construction permit combined with an operating license (see 10 C.F.R. § 52.1(a)), the proximity presumption would appear, in general, to apply to such applications.

An organization may establish its standing to intervene based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding), or representational standing (based on the standing of its members). Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding, it must identify that member by name and address and it must show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." See, e.g., *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 195 (2006), citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Further, for the organization to establish representational standing, the member seeking representation must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Palisades*, CLI-07-18, 65 NRC at 409; PFS, CLI-99-10, 49 NRC at 323, citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

B. Legal Requirements for Contentions

The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly § 2.714(b)).⁵

The standards in 10 C.F.R. § 2.309(f)(1) may be summarized as follows: An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide 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 the hearing; and (6) provide sufficient information to show that a genuine dispute exists with 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.⁶ See 10 C.F.R. § 2.309(f) (2008).

⁵ The Commission recodified the requirements of former § 2.714, together with rules regarding contentions set forth in Commission cases, in § 2.309 in 2004. See "Changes to Adjudicatory Process" (Final Rule), 69 Fed. Reg. 2182 (Jan. 14, 2004), *as corrected*, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the recodified provisions of § 2.309. See 69 Fed. Reg. at 2202. Accordingly, Commission and Appeal Board decisions on former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

⁶ Section 2.309(f) states the following requirements for contentions:

(f) Contentions.

- (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(continued. . .)

Sound legal and policy considerations underlie the Commission's contention requirements. The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202; *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Phila. Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has

(. . .continued)

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report[.]

10 C.F.R. § 2.309(f)(1)-(2).

emphasized that the rules on contention admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; see also, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Ariz. Pub. Serv. Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). “Mere ‘notice pleading’ does not suffice.”⁷ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111,119 (2006).

Finally, it is well established that the purpose for the basis requirements is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); *Ariz. Pub. Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991). The *Peach Bottom* decision requires that a contention be rejected if:

- (1) it constitutes an attack on applicable statutory requirements;

⁷ See also *Ariz. Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991) These requirements are intended, *inter alia*, to ensure that a petitioner reviews the application and supporting documentation prior to filing contentions; that the contention is supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute between the petitioner and the applicant before a contention is admitted for litigation -- so as to avoid the practice of filing contentions which lack any factual support and seeking to flesh them out later through discovery. See, e.g., *Shoreham*, 34 NRC at 167-68.

- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
- (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21.

These rules focus the hearing process on real disputes susceptible of resolution in an adjudication. See *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 334 (1999). For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies. *Id.* Specifically, NRC regulations do not allow a contention to attack a regulation unless the proponent requests a waiver from the Commission. 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, *Entergy Nuclear Generation Co., and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)*, CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007), citing *Millstone*, CLI-01-24, 54 NRC at 364.

II. STANDING

Five separate groups or entities have asserted standing in this matter and have jointly filed the proposed contentions. Each group alleges that its members have standing either due to proximity to the site or due to the ability to demonstrate that they have suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury can fairly be traced to the challenged action, and the injury is likely to be redressed by a favorable decision. Petition at 6.

A. Standing of Atlanta Women's Action for New Direction ("Atlanta WAND")

Atlanta WAND asserts representational standing to intervene in this proceeding by claiming that two of its members who live within 50 miles of the proposed site have authorized Atlanta WAND to represent them in this proceeding. Petition at 5. These individuals are: Terence Alton Dicks and Annie Laura Stevens (collectively, Atlanta WAND). *Id.* at 5. Atlanta WAND states that these members reside within 50 miles of the proposed site (*id.* at 6) and have standing either due to their proximity to the site or because they have suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury can fairly be traced to the challenged action, and the injury is likely to be redressed by a favorable decision.

In order to establish representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member's interests. *See Palisades*, CLI-07-18, 65 NRC at 409. As set forth below, Atlanta WAND satisfies the representational standing requirement. The two individuals named in the Petition have provided virtually identical declarations, which are attached to the Petition, in support of Atlanta WAND's standing. *See* "Declaration of Annie Laura Stevens" (October 24, 2008); "Declaration of Terence Alton Dicks" (November 14, 2008).

In view of the foregoing, each of Atlanta WAND's two named members has established standing to intervene in his or her own right by satisfying the proximity presumption.⁸ Further, both members have authorized Atlanta WAND to represent their interests in the instant

⁸ All address locations were confirmed using the mapping programs at <http://maps.yahoo.com>, <http://www.mapquest.com> and <http://maps.google.com>.

proceeding. Accordingly, Atlanta WAND has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to Atlanta WAND's representational standing to intervene.

B. Standing of Blue Ridge Environmental Defense League ("BREDL")

BREDL asserts representational standing to intervene in this proceeding by claiming that forty-three of its members have authorized BREDL to represent them in this proceeding.

Petition at 3-5, 6. These individuals are: Shahid Abdul-Jabba, Jeffrey Alston, Martha Argyle, Melvin Lee Avery, Darry L. Brown, Sr., Kathryn P. Capizzi, Shirley Coleman, Charles Cooper, Victoria Davis, Sherry Dixon, Harvie Dixon, Jr., David A. Dorch, Gregory L. Douse, Sr., Derbianna Frank, Evelyn Fulton, Beatrice W. Holiday, Wykeshia Hughes, Ben Jackson, Sheila Jackson, Wayne Jackson, Cheryl Johnson, Ethel Jones, Eunice Jordan, Cicero Luke, Holicc McClain, Johnnie McGhee, George Mitchell, Cora L. Moore, Hayward C. Nipper, Andre Samuels, Lowell Spurgeon, Melvin Stewart, Nelson Stokes, J. Toombs, Anthony Utley, Eula Utley, Brenda A. Utley, Demetria Utley, Lee Alice Walker, Michael Walker, Mildred Walker, Kiffiny Ward, and Kimberly Wesby. (collectively, BREDL). *Id.* at 5-6. BREDL states that these members reside within 50 miles of the proposed site (*id.* at 6) and have standing either due to their proximity to the site or because they have suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury can fairly be traced to the challenged action, and the injury is likely to be redressed by a favorable decision. *Id.* at 6.

In order to establish representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member's interests. See *Palisades*, CLI-07-18, 65 NRC at 409. As set forth below, BREDL satisfies the representational standing requirement by satisfying the proximity presumption for the majority of its named members. All

of the forty-three individuals named in the Petition have provided virtually identical declarations, which are attached to the Petition, in support of BREDL's standing. See "Declaration of Shahid Abdul-Jabba" (October 8, 2008), "Declaration of Jeffrey Alston" (October 30, 2008), "Declaration of Martha Argyle" (October 23, 2008), "Declaration of Melvin Lee Avery" (October 14, 2008), "Declaration of Darry L. Brown, Sr." (November 1, 2008), "Declaration of Kathryn P. Capizzi" (November 1, 2008), "Declaration of Shirley Coleman" (October 13, 2008), "Declaration of Charles Cooper" (October 19, 2008), "Declaration of Victoria Davis" (October 23, 2008), "Declaration of Sherry Dixon" (October 13, 2008), "Declaration of Harvie Dixon, Jr." (October 23, 2008), "Declaration of David A. Dorch" (October 28, 2008), "Declaration of Gregory L. Douse, Sr." (November 1, 2008), "Declaration of Derbianna Frank" (October 28, 2008), "Declaration of Evelyn Fulton" (October 27, 2008), "Declaration of Beatrice W. Holiday" (October 17, 2008), "Declaration of Wykeshia Hughes" (October 28, 2008), "Declaration of Ben Jackson" (November 4, 2008), "Declaration of Sheila Jackson" (November 4, 2008), "Declaration of Wayne Jackson" (November 4, 2008), "Declaration of Cheryl Johnson" (October 28, 2008), "Declaration of Ethel Jones" (November 1, 2008), "Declaration of Eunice Jordan" (October 14, 2008), "Declaration of Cicero Luke" (October 19, 2008), "Declaration of Holice McClain" (October 23, 2008), "Declaration of Johnnie McGhee" (October 17, 2008), "Declaration of George Mitchell" (November 1, 2008), "Declaration of Cora L. Moore" (October 28, 2008), "Declaration of Hayward C. Nipper" (October 28, 2008), "Declaration of Andre Samuels" (October 19, 2008), "Declaration of Lowell Spurgeon" (November 2, 2008), "Declaration of Melvin Stewart" (November 1, 2008), "Declaration of Nelson Stokes" (October 12, 2008), "Declaration of J. Toombs" (October 13, 2008), "Declaration of Anthony Utley" (November 7, 2008), "Declaration of Brenda A. Utley" (November 10, 2008), "Declaration of Demetria Utley" (October 11, 2008), "Declaration of Lee Alice Walker" (October 12, 2008), "Declaration of Michael Walker" (October 12, 2008), "Declaration of Mildred Walker" (October 12, 2008), "Declaration of Kiffiny Ward"

(October 23, 2008), “Declaration of Kimberly Wesby” (November 1, 2008), and “Declaration of Eula Utley” (November 8, 2008).

BREDL does not satisfy the representational standing requirement for Mr. Shahid Abdul-Jabba, Ms. Beatrice W. Holiday, Ms. Cora L. Moore, Mr. Anthony Utley or Ms. Brenda Utley based solely on their proximity to the site as their declarations do not provide complete addresses. See “Declaration of Shahid Abdul-Jabba” (October 8, 2008), “Declaration of Beatrice W. Holiday” (October 17, 2008), “Declaration of Cora L. Moore” (October 28, 2008), “Declaration of Anthony Utley” (November 7, 2008), and “Declaration of Ms. Brenda Utley” (November 10, 2008). Although the declarations of these BREDL members indicate that they have authorized BREDL to represent their interests, and state that the construction of the proposed nuclear reactors could pose a grave risk to their health and safety, they have failed to provide the requisite complete address in order to confirm that they live within 50 miles of the site of the proposed reactors.

As an alternative to the proximity presumption, BREDL alleges representational standing with reference to all members due to allegations that they will 1) suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes; 2) the injury can be fairly traced to the challenged action; and 3) the injury is likely to be redressed by a favorable decision. *Id.* at 6. The BREDL members who do not satisfy the proximity presumption state that they believe construction of the proposed reactors could pose a grave risk to their health. See “Declaration of Shahid Abdul-Jabba” (October 8, 2008), “Declaration of Beatrice W. Holiday” (October 17, 2008), “Declaration of Cora L. Moore” (October 28, 2008), “Declaration of Anthony Utley” (November 7, 2008), and “Declaration of Ms. Brenda Utley” (November 10, 2008). An individual can establish standing for himself if he makes a sufficient showing under the “proximity presumption.” While these BREDL members have not demonstrated that they live within 50 miles of the subject site, “significant contacts with

an affected area can be sufficient to establish standing, even when full-time residence within the 50-mile zone is not shown.” *Southern Nuclear Operating Company* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 296 (2007).⁹ These members of BREDL have not alleged that they spend significant amounts of time within a 50-mile radius of the Vogtle site, thus placing themselves within the zone of potential harm presumed to allow standing in reactor construction permit and operating license proceedings.

Because the proximity presumption does not apply, these BREDL members’ declarations “must be examined to determine whether they meet traditional judicial concepts for standing”: i.e., they must demonstrate “an actual, concrete harm resulting from the proposed activity that will be redressed by a favorable decision.” *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-04, 56 NRC 15, 26 (2002); citing *Pebble Springs*, CLI-76-27, 4 NRC at 613-14. The allegations of the BREDL members who do not satisfy the standing requirements through the proximity presumption, however, are speculative and those members have failed to demonstrate that they will suffer specific harm from these alleged potential impacts or that their alleged injuries would be redressed by a favorable decision by the Board. While these alleged potential impacts may be of concern to the general public, to allow standing for intervention in a proceeding, the petitioner must demonstrate that he will suffer a specific harm from these potential impacts. These BREDL members have failed to allege that they will suffer any specific harm from these impacts and have failed to establish their standing as a matter of right to intervene.

⁹ The *Turkey Point* decision summarizes the development of this doctrine. See *Turkey Point*, LBP-01-6, 53 NRC at 147-48.

They have also failed to provide enough information to satisfy the requirements for discretionary standing under 2.309(e).¹⁰ Based on their declarations and the Petition, it does not appear that the representation of these BREDL members in the proceeding will assist in developing a sound record. Nor have these BREDL members alleged that they will suffer harm to their property, financial, or other interests at a level required for discretionary standing.

BREDL does not satisfy the representational standing requirement for Mr. Anthony Utley or Ms. Brenda Utley based solely on their proximity to the site as their declarations do not provide a complete address. See “Declaration of Anthony Utley” (November 7, 2008) and “Declaration of Ms. Brenda Utley” (November 10, 2008). Although both Anthony Utley and Brenda Utley indicate that they have authorized BREDL to represent their interests, and state that the construction of the proposed nuclear reactors could pose a grave risk to their health and safety, Mr. Utley and Ms. Utley have failed to provide the requisite complete address in order to confirm that they live within the cone of interests protected by the governing statutes.

Of note, Demetria Utley has provided a declaration and street address identical to those of Anthony Utley and Brenda Utley. See “Declaration of Demetria Utley” (October 11, 2008). Demetria Utley has included the appropriate city and state, which is within a 50-mile radius of

¹⁰ As pertinent here, § 2.309(e)(1) provides:

- (1) *Factors weighing in favor of allowing intervention.*
 - (i) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record;
 - (ii) The nature and extent of the requestor’s/petitioner’s property, financial or other interests in the proceeding; and
 - (iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest[.]

Section 2.309(e)(2) provides the factors weighing against allowing intervention.

the proposed new reactors; however, it is the position of the NRC staff that the declarations of Anthony Utley and Brenda Utley remain inadequate individually to confer standing.

BREDL also fails to satisfy the representational standing requirement for Melvin Lee Avery based solely on his proximity to the site, as his declaration does not appear to provide a correct address. See "Declaration of Melvin Lee Avery" (October 14, 2008). Although Mr. Avery's declaration indicates that he has authorized BREDL to represent his interests, and states that the construction of the proposed nuclear reactors could pose a grave risk to his health and safety, Mr. Avery has failed to provide a correct address in order to confirm that he lives within the zone of interests protected by the governing statutes. Mr. Avery's petition states that he lives on Hadow Ridge Drive in Augusta, Georgia. It appears that there is no such street address in Augusta, although there is an apartment complex on Shadowridge Drive. Although Shadowridge Drive is within a 50-mile radius of the proposed new reactors, it is the position of the NRC staff that the declaration of Mr. Avery remains inadequate to confer standing.

As an alternative to the proximity presumption, BREDL alleges representational standing with reference to all members due to their allegations that they will 1) suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes; 2) the injury can be fairly traced to the challenged action; and 3) the injury is likely to be redressed by a favorable decision. *Id.* at 6. Mr. Avery states that he believes that construction of the proposed reactors could pose a grave risk to his health. See "Declaration of Melvin Lee Avery" (October 14, 2008). An individual can establish standing for himself if he makes a sufficient showing under the "proximity presumption." While Mr. Avery has not demonstrated that he lives within 50 miles of the subject site, "significant contacts with an affected area can be sufficient to establish standing, even when full-time residence within the 50-mile zone is not shown." *Southern Nuclear Operating Company*, LBP-07-3, 65 NRC 237, 296 (2007). Mr. Avery has not alleged that he spends significant amounts of time within a 50-

mile radius of the Vogtle site, thus placing himself within the zone of potential harm presumed to allow standing in reactor construction permit and operating license proceedings.

Because the proximity presumption does not apply, Mr. Avery's declaration "must be examined to determine whether it meets traditional judicial concepts for standing": i.e., he must demonstrate "an actual, concrete harm resulting from the proposed activity that will be redressed by a favorable decision." *Tennessee Valley Authority*, LBP-02-04, 56 NRC 15, 26 (2002). Mr. Avery has alleged that construction of the proposed reactors could pose a grave risk to his health and safety. Mr. Avery's allegations, however, are speculative and he has failed to demonstrate that he will suffer specific harm from these alleged potential impacts or that his alleged injuries would be redressed by a favorable decision by the Board. While these alleged potential impacts may be of concern to the general public, to allow standing for intervention in a proceeding, the petitioner must demonstrate that he will suffer a specific harm from these potential impacts. Mr. Avery has failed to allege that he will suffer any specific harm from these impacts and has failed to establish his standing as a matter of right to intervene.

He has also failed to provide enough information to satisfy requirements for discretionary standing under 2.309(e). Based on his declaration and the Petition, it does not appear that the representation of Mr. Avery in the proceeding will assist in developing a sound record. Nor has Mr. Avery alleged that he will suffer harm to his property, financial, or other interests at a level required for discretionary standing.

In view of the foregoing, except for those individuals noted above, each of BREDL's forty-three named members has established standing to intervene in his or her own right by satisfying the proximity presumption. Further, all forty-three named members have authorized BREDL to represent their interests in the instant proceeding. Accordingly, BREDL has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to BREDL's representational standing to intervene.

C. Standing of Center for a Sustainable Coast (“CSC”)

CSC asserts representational standing to intervene in this proceeding by claiming that one of its members, Sam Booher, who lives within 50 miles of the proposed site has authorized CSC to represent him in this proceeding. Petition at 6. CSC also asserts representational standing to intervene in this proceeding on behalf of Stephen N. Willis, who does not live within 50 miles of the proposed site. *Id.* at 6. CSC states that these members have standing either due to their proximity to the site or because they have suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury can fairly be traced to the challenged action, and the injury is likely to be redressed by a favorable decision.

In order to establish representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member’s interests. *See Palisades*, CLI-07-18, 65 NRC at 409. As set forth below, CSC satisfies the representational standing requirement for Mr. Booher whose declaration, which is attached to the Petition in support of CSC’s standing, indicates that he lives within 50 miles of the site. *See* “Declaration of Sam Booher” (November 13, 2008). *See* footnote 8, *supra*.

CSC does not satisfy the representational standing requirement for Mr. Willis based solely on his proximity to the site, as his declaration indicates that he lives in Savannah, Georgia, within approximately 120 miles of the site. *See* “Declaration of Stephen N. Willis” (November 1, 2008). Instead, CSC alleges representational standing with reference to Mr. Willis due to his allegations that he will 1) suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes; 2) the injury can be fairly traced to the challenged action; and 3) the injury is likely to be redressed by a favorable decision. *Id.* at 3-6. Mr. Willis states that he is an “avid sportsman, naturalist, and

resident of the Savannah River Basin” and that “the proposed nuclear reactor construction and operation will have serious negative impacts on my personal avocation and welfare.” Mr. Willis’s declaration lists several alleged potential impacts from the proposed construction including: a reduction in river flow, salt water intrusion, disruption of river ecology as a result of discharge of reactor cooling water into the river and possible catastrophic disaster. See “Declaration of Mr. Stephen N. Willis.” An individual can establish standing for himself if he makes a sufficient showing under the “proximity presumption.” While Mr. Willis does not live within 50 miles of the subject site, “significant contacts with an affected area can be sufficient to establish standing, even when full-time residence within the 50-mile zone is not shown.” *Southern Nuclear Operating Company*, LBP-07-3, 65 NRC 237, 296 (2007). Mr. Willis has not alleged that he spends significant amounts of time within a 50-mile radius of the Vogtle site, thus placing himself within the zone of potential harm presumed to allow standing in reactor construction permit and operating license proceedings. Although he states that he is an avid hunter and sportsman, Mr. Willis does not allege that he hunts or fishes within a 50-mile radius of the VEGP site.

Because the proximity presumption does not apply, Mr. Willis’s declaration “must be examined to determine whether it meets traditional judicial concepts for standing”: i.e., he must demonstrate “an actual, concrete harm resulting from the proposed activity that will be redressed by a favorable decision.” *Tennessee Valley Authority*, LBP-02-04, 56 NRC 15, 26 (2002). Mr. Willis has alleged that construction of the proposed reactors will cause a reduction in river flow, salt water intrusion, disruption of river ecology as a result of discharge of reactor cooling water into the Savannah River and possible catastrophic disaster. Mr. Willis’s allegations, however, are speculative and he has failed to demonstrate that he will suffer specific harm from these alleged potential impacts or that his alleged injuries would be redressed by a favorable decision by the Board. It is also unclear how he will suffer any

concrete, actual harm from possible disruption of the river ecology, a reduction in river flow, or salt water intrusion. While these alleged potential impacts may be of concern to the general public, to allow standing for intervention in a proceeding, the petitioner must demonstrate that he will suffer a specific harm from these potential impacts. Mr. Willis has failed to allege that he will suffer any specific harm from these impacts and has failed to establish his standing as a matter of right to intervene.

He has also failed to provide enough information to satisfy requirements for discretionary standing under §2.309(e). Based on his declaration and the Petition, it does not appear that the representation of Mr. Willis in the proceeding will assist in developing a sound record. Nor has Mr. Willis alleged that he will suffer harm to his property, financial, or other interests at a level required for discretionary standing.

In view of the foregoing, one of CSC's two named members has established standing to intervene in his own right by satisfying the proximity presumption and has authorized CSC to represent his interests in the instant proceeding. Accordingly, CSC has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to CSC's representational standing to intervene on behalf of Mr. Booher. However, the NRC staff does object to CSC's representational standing to intervene on behalf of Mr. Willis, as he has failed to establish standing in his own right.

D. Standing of Savannah Riverkeeper

Savannah Riverkeeper asserts representational standing to intervene in this proceeding by demonstrating that two of its named members who live within 50 miles of the proposed site have authorized Savannah Riverkeeper to represent them in this proceeding. Petition at 5. These individuals are: Judith E. Gordon and Charles N. Utley (collectively, Savannah

Riverkeeper). *Id.* at 6. Savannah Riverkeeper states that these members reside within 50 miles of the proposed site (*id.* at 6) See Footnote 8. and have standing either due to their proximity to the site or because they have suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury can fairly be traced to the challenged action, and the injury is likely to be redressed by a favorable decision.

In order to establish representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member's interests. See *Palisades*, CLI-07-18, 65 NRC at 409. As set forth below, Savannah Riverkeeper satisfies the representational standing requirement. The two individuals named in the Petition have provided virtually identical declarations, which are attached to the Petition, in support of Savannah Riverkeeper's standing. See "Declaration of Judith E. Gordon" (November 11, 2008); "Declaration of Charles N. Utley" (November 10, 2008).

In view of the foregoing, each of Savannah Riverkeeper's two named members has established standing to intervene in his or her own right by satisfying the proximity presumption. Further, both named members have authorized Savannah Riverkeeper to represent their interests in the instant proceeding. Accordingly, Savannah Riverkeeper has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to Savannah Riverkeeper's representational standing to intervene.

E. Standing of Southern Alliance for Clean Energy ("SACE")

SACE asserts representational standing to intervene in this proceeding by demonstrating that three of its members who live within 50 miles of the proposed site have authorized SACE to represent them in this proceeding. Petition at 5. These individuals are:

Susan Bloomfield, William J. Mareska and David J. Matos (collectively, SACE). *Id.* at 6. SACE states that these members reside within 50 miles of the proposed site (*id.* at 6) and have standing either due to their proximity to the site or because they have suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury can fairly be traced to the challenged action, and the injury is likely to be redressed by a favorable decision.

In order to establish representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member's interests. *See Palisades*, CLI-07-18, 65 NRC at 409. As set forth below, SACE satisfies the representational standing requirement. All of the three individuals named in the Petition have provided virtually identical declarations, which are attached to the Petition, in support of SACE's standing. *See* "Declaration of Susan Bloomfield" (August 10, 2008), "Declaration of William J. Mareska" (October 10, 2008), "Declaration of David J. Matos" (November 13, 2008). Further, all of the three individuals named in the Petition have satisfied the proximity presumption by demonstrating that they reside within 50 miles of the proposed site. *See* footnote 8, *supra*.

In view of the foregoing, each of SACE's three named members has established standing to intervene in his or her own right by satisfying the proximity presumption. Further, all three named members have authorized SACE to represent their interests in the instant proceeding. Accordingly, SACE has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to SACE's representational standing to intervene.

III. PETITIONERS' PROPOSED CONTENTIONS

Petitioners submitted three proposed contentions, which are discussed below. As explained below, the Staff opposes admission of all of Petitioners' proposed contentions. The NRC Staff discusses the proposed contentions *seriatim* as they appear in the Petitioners' filing.

In its Order of December 2, 2008, the Licensing Board directed Petitioners to advise the Board by Friday, December 5, 2008 if they disagreed with the alphanumeric designations of MISC-1, MISC -2 and SAFETY-1, assigned by the Board in its Order to the three contentions designated by Petitioners as Technical Contention 1, Technical Contention 2 and Safety Contention 1, and further to explain what other designations under the Board's labeling scheme set forth in the Order they would feel were more appropriate. *See Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, 68 NRC ____ (slip op. at 3) (December 2, 2008). Petitioners did not file on Friday, December 5th, to advise the Board of a disagreement. Therefore, the Staff refers to the three contentions by the alphanumeric designations assigned to them by the Board.

A. Petitioners' First Contention

TC1 (AP1000 Revision 16): 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.

Petition at 8.

In Proposed Contention 1, which the Staff will refer to hereinafter as MISC-1, Petitioners contend that critical information concerning the design and operation of the proposed reactors is lacking, *Id.* at 9-10, and that a significant portion of the reactor design as proposed in Revision 16 of the AP1000 design certification amendment is not certified by 10 C.F.R. Part 52, Appendix D, and remains experimental. *Id.* at 10. Petitioners conclude that "[t]he lack of information

about the basic design and operating requirements for the AP1000 Revision 16 does not allow Petitioners to conduct a full and meaningful technical and safety review of VEGP Units 3 and 4.” *Id.* at 11.

Staff Response: A contention that simply alleges that some matter ought to be considered does not provide the basis for an admissible contention. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993). A contention is inadmissible if it fails to contain sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact and does not include references to the specific portions of the application that a petitioner may dispute. See *Pacific Gas and Electric Co.* (Diablo Canyon ISFSI), CLI-08-01, 67 NRC 1, 8 (2008). For the reasons explained below, this contention is inadmissible because it fails to demonstrate a material dispute with the Applicant and it is a challenge to current NRC regulations. See 10 C.F.R. §§ 2.309, 2.335.

1. Contention MISC-1 Does Not Demonstrate a Material Dispute with the Applicant.

In support of this contention, Petitioners argue the Commission has directly contemplated their situation in a recent memorandum and order. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant), Memorandum and Order, CLI-08-15, slip op. (2008) (“[i]f the Petitioners believe the [COLA] is incomplete in some way, they may file a contention to that effect. Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications.”).¹¹ Indeed, NRC procedural regulations explicitly contemplate contentions of

¹¹ Petitioners also cite a recent licensing board decision admitting a contention challenging an applicant’s reliance on pending design certification in its COL application. See *Progress Energy* (continued. . .)

omission. The regulations require that a petitioner alleging unlawful omissions in a license application “identif[y]...each failure and the supporting reason for the petitioner’s belief....” 10 C.F.R. § 2.309(f)(1)(vi). Petitioners fail to meet this burden. Petitioners state that “there remain a number of serious inadequacies in the Revision 16 design that have not been satisfactorily addressed, including those related to safety.” Petition at 9. Petitioners go on to proffer one example of a discussion of an incomplete recirculation screen design. *Id.* But Petitioners do not comply with 10 C.F.R. § 2.309(f)(1)(vi)’s requirement that they provide supporting reasons for their belief that the application does not contain information required by law. They simply list unsupported alleged omissions. *Id.* at 9-10. Furthermore, Petitioners include a lengthy list of components they allege are not in the DCD. It reads as follows:

- a. The final design of the reactor containment.
- b. The control room set up and operator decision-making procedures.
- c. Seismic qualifications for various components of the AP1000 reactors.
- d. The establishment of fire protection areas.
- e. Technology requirements for heat removal.
- f. Human factors engineering throughout the plant.
- g. Plant personnel requirements.
- h. Alarm systems throughout the plant.
- i. Plant-wide requirements for pipes and conduits.

(. . .continued)

Carolinas, Inc. (Shearon Harris Nuclear Power Plant), Board Memorandum and Order (Ruling on Standing and Contention Admissibility) (October 30, 2008). There is a licensing board split on this matter. See *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station) Board Memorandum and Order (Ruling on Petition for Intervention and Request for Hearing) (holding inadmissible a contention challenging an applicant’s reliance on a pending design certification). Furthermore, both the Staff and the Applicant have appealed the admission of the contention challenging Progress Energy, Inc.’s reliance on the pending design certification rulemaking in its COL. See “NRC Staff Notice of Appeal of LBP-08-21, Memorandum and Order (Ruling on Standing and Contention Admissibility), and Accompanying Brief,” (November 10, 2008) (ADAMS Accession No. ML0831506862); “Progress Energy’s Appeal of the Atomic Safety and Licensing Board’s Decision Admitting the North Carolina Waste Awareness and Reduction Network,” (November 10, 2008) (ADAMS Accession No. ML0831514081).

Id. But as explained below, the DCD appears to include every item on the Petitioners' list, and the COLA incorporates by reference the DCD.

The final design of the reactor containment is discussed in two different portions of the DCD. See AP1000 Design Control Document; §§ 3.8.2, Steel Containment;¹² 6.2, Containment Systems.¹³ Petitioners do not challenge the adequacy of the discussion in these portions of the DCD.

The control room set up and operator decision-making procedures are discussed in Chapter 18 of the DCD. *Id.* at Chapter 18, Human Factors Engineering.¹⁴ Petitioners do not challenge the adequacy of the discussion in this portion of the DCD.

The seismic qualifications for various components of the AP1000 reactors are found in Chapter 3 of the DCD. *Id.* at §§ 3.9.3, ASME Code Classes 1, 2, and 3 Components, Component Supports, and Core Support Structures;¹⁵ 3.10, Seismic and Dynamic Qualification of Seismic Category I Mechanical and Electrical Equipment;¹⁶ Appendix 3D, Methodology for Qualifying AP1000 SAFETY-Related Electrical and Mechanical Equipment.¹⁷ Petitioners do not challenge the adequacy of the discussion in these portions of the DCD.

¹² ADAMS Accession Nos. ML071580883 (Revision 16); ML083230305 (Revision 17).

¹³ ADAMS Accession Nos. ML071580911 (Revision 16); ML083230332 (Revision 17).

¹⁴ ADAMS Accession Nos. ML071580842-ML071580856 (Revision 16); ML083230262, ML083230264-ML083230277 (Revision 17).

¹⁵ ADAMS Accession Nos. ML071580884 (Revision 16); ML083230306 (Revision 17).

¹⁶ ADAMS Accession Nos. ML071580873 (Revision 16); ML083230297 (Revision 17).

¹⁷ ADAMS Accession Nos. ML071580889 (Revision 16); ML083230311 (Revision 17).

The establishment of fire protection areas is discussed in Chapter 9 of the DCD. *Id.* at § 9.5.1, Fire Protection System;¹⁸ Appendix 9A, Fire Protection Analysis.¹⁹ Petitioners do not challenge the adequacy of the discussion in these portions of the DCD.

It is unclear what the Petitioners mean by “technology requirements for heat removal.” They have not provided sufficient detail to point the Staff to the omissions they allege. But systems for safe shutdown are discussed in Chapter 6 of the DCD, and systems for design basis accidents are discussed in Chapter 15 of the DCD. *Id.* at § 6.3, Passive Core Cooling System;²⁰ Chapter 15, Accident Analyses.²¹ *See also id.* at § 14.2.9, Preoperational Test Descriptions.²² Petitioners do not challenge the adequacy of the discussion in these portions of the DCD.

Human factors engineering is discussed in Chapter 18 of the DCD. *Id.* at Chapter 18, Human Factors Engineering.²³ Petitioners do not challenge the adequacy of the discussion in this portion of the DCD.

It is unclear what Petitioners mean by “plant personnel requirements.” They have not provided sufficient detail to point the Staff to the omissions they allege. But there are likely relevant discussions in Chapters 13 and 18 of the DCD. *Id.* at §§ 13.2, Training;²⁴ 18.6,

¹⁸ ADAMS Accession Nos. ML071580935 (Revision 16); ML083230721 (Revision 17).

¹⁹ ADAMS Accession Nos. ML071580937 (Revision 16); ML083230723 (Revision 17).

²⁰ ADAMS Accession Nos. ML071580912 (Revision 16); ML083230333 (Revision 17).

²¹ ADAMS Accession Nos. ML071580821 (Revision 16); ML083230239 (Revision 17).

²² ADAMS Accession Nos. ML071580817 (Revision 16); ML083230235 (Revision 17).

²³ ADAMS Accession Nos. ML071580842-ML071580856 (Revision 16); ML083230262, ML083230264-ML083230277 (Revision 17).

²⁴ ADAMS Accession Nos. ML071580815 (Revision 16); ML083230233 (Revision 17).

Staffing.²⁵ Petitioners do not challenge the adequacy of the discussion in these portions of the DCD.

It is unclear what Petitioners mean by “alarm systems throughout the plant.” They have not provided sufficient detail to point the Staff to the omissions they allege. But there are likely relevant discussions in Chapters 7, 9, 13, and 18 of the DCD. *Id.* at Chapter 7, Instrumentation Controls;²⁶ Chapter 9, Auxiliary Systems;²⁷ § 13.6, Security;²⁸ § 18.6, Staffing.²⁹ Petitioners do not challenge the adequacy of these portions of the DCD.

Again, it is unclear what Petitioners mean by “plant-wide requirements for pipes and conduits.” They have not provided sufficient detail to point the Staff to the omissions they allege. But there is likely relevant discussion in various sections of the DCD. *See id.* at Chapter 3, Design of Structures, Components, Equipment and Systems;³⁰ Chapter 7, Instrumentation and Controls;³¹ § 9.5.1, Fire Protection System.³² Petitioners do not challenge the adequacy of the discussion in these portions of the DCD.

²⁵ ADAMS Accession Nos. ML071580852 (Revision 16); ML083230273 (Revision 17).

²⁶ ADAMS Accession Nos. ML071580918-ML071580924, ML071580926 (Revision 16); ML083230339-ML083230346 (Revision 17).

²⁷ ADAMS Accession Nos. ML071580931-ML071580937 (Revision 16); ML083230351-ML083230354, ML083230721-ML083230723 (Revision 17).

²⁸ ADAMS Accession Nos. ML071580815 (Revision 16); ML083230233 (Revision 17).

²⁹ ADAMS Accession Nos. ML071580852 (Revision 16); ML083230273 (Revision 17).

³⁰ ADAMS Accession Nos. ML071580873-ML071580878, ML071580880-ML071580894 (Revision 16); ML083230297-ML083230317 (Revision 17).

³¹ ADAMS Accession Nos. ML071580918-ML071580924, ML071580926 (Revision 16); ML083230339-ML083230346 (Revision 17).

³² ADAMS Accession Nos. ML071580935 (Revision 16); ML083230721 (Revision 17).

Petitioners also assert that “[b]ecause the final configuration, design, and operating procedures of VEGP Units 3 and 4 are not described in the COLA, the requisite risk assessment cannot be conducted and the [Severe] Accident Mitigation Alternatives cannot be determined.” Petition at 11. But this is not true. Such information is found in the Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle ESP Electric Generating Plant Site (Vogtle ESP FEIS).³³ Section 5.10 of the Vogtle ESP FEIS contains the Environmental Impacts of Postulated Accidents. Section 5.10.3 contains the Severe Accidents Mitigation Alternatives. Petitioners have provided no support for their allegation that these analyses cannot be conducted or determined.

Petitioners have not provided any reasoning for their allegations that the license application does not contain the components and procedures listed in the Petition. *Id.* at 9-10. Petitioners have simply listed items alleged to be missing from the DCD (and thus the COLA) without providing the support required by 10 C.F.R. § 2.309(f)(1)(vi). If they are alleging omissions to the DCD, and therefore COLA, they have not provided specific support for the requirement for the alleged omission. Moreover, the Petitioners’ allegations are not only unsupported, they also appear to be mistaken. The Staff has provided citations above to the DCD where each of the items Petitioners list is discussed. Some of Petitioners’ allegations are vague to the point that the Staff does not understand what exactly they attempt to allege. Regardless, the Staff has listed numerous citations to the DCD that may likely answer Petitioners’ vague allegations of omission.

In their numerous allegations of omission, Petitioners provide no support for their belief that the application omits information on a relevant matter required by law. Therefore,

³³ <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1872/index.html>.

Petitioners have not demonstrated a material dispute with the Applicant, as NRC procedural regulations require. See 10 C.F.R. § 2.309(f)(1)(vi).

2. Proposed Contention MISC-1 Challenges NRC Regulations.

The Staff cannot determine what Petitioners mean when they say, “Revision 16 currently lists 172 separate sections concerning various aspects of the AP1000 reactor, totaling more than 6,500 pages. However, only 21 of these sections appear to have been certified by the NRC over the last two years of review.” Petition at 10. On January 27, 2006, the NRC issued the final Design Certification Rule (DCR) for Revision 15 of the AP1000 DCD, which was incorporated into agency regulations in Part 52, Appendix D. See 71 Fed. Reg. 4464 (Jan. 27, 2006). As required by NRC regulations, the AP1000 (Revision 15) DCR was certified as meeting “the applicable standards and requirements of the Atomic Energy Act and the Commission’s regulations” before the Commission issued the DCR. See 10 C.F.R. § 52.54(a)(1)-(8). Petitioners seem to misunderstand the design certification amendment process. Following an acceptance review, the Staff docketed for review a proposed amendment (Revision 16) to the certified Westinghouse AP1000 design (Revision 15, 10 C.F.R. Part 52, Appendix D). See Westinghouse Electric Company; Acceptance for Docketing of a Design Certification Rule Amendment Request for the AP1000 Design,” 73 Fed. Reg. 4926 (Jan. 28, 2008). Revision 16 republished the entire certified DCD, with various amendments.³⁴

³⁴ For a detailed listing of the changes Revision 16 makes to Revision 15, see “Westinghouse AP1000 Design Control Document Rev. 17 – Tier 1 – Change Roadmap” at xxvii-xxx, available at http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=083250950, ADAMS Accession No. ML083230170; “Westinghouse AP1000 Design Control Document Rev. 17 – Tier 2 – Change Roadmap” at cxx-clxi, available at http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=083250968, ADAMS Accession No. ML083230194.

Petitioners appear to object to the fact that the design certification rulemaking is not yet complete. But as recently reaffirmed by the 1st Circuit, the NRC may determine generic issues in rulemaking rather than through litigation in individual cases. See *Massachusetts v. U.S.*, 552 F.3d 115, 119 (1st Cir. 2008). The NRC certifies generic nuclear reactor designs through rulemaking. As the Commission has held,

“[a] specific provision of Part 52...allows applicants to reference a certified design that has been docketed but not approved, and Petitioners may not challenge Commission regulations in licensing proceedings. Thus, although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC's regulations, nonetheless, allow an applicant - at its own risk - to submit a COL application that does not reference a certified design.”

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant Units 2 and 3) Memorandum and Order, CLI-08-15, slip op. at 3 (2008); see also Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final DCR, such a contention should be denied. A petitioner is foreclosed from filing contentions regarding a previously certified design in a COL proceeding. See 10 C.F.R. § 2.335. Thus, Petitioners are foreclosed from filing contentions regarding the previously certified AP1000 Revision 15 design. See 10 C.F.R. Part 52, Appendix D.VI “Issue Resolution.” To the extent that Petitioners are attempting to challenge the previously certified design, or the Part 52 process which allows a COL applicant to reference a certified design, such a challenge is barred since the Petition does not comply with the procedure laid out in 10 C.F.R. § 2.335 for challenging regulations.³⁵

³⁵ Of course, if the design certification for the amended AP1000 is not complete when the COL (continued. . .)

Petitioners also appear to challenge the two-tier rule structure. In the design certifications that have been certified thus far, the NRC has adopted a two-tier rule structure. The definitions for the two-tier rule structure are included in the appendix to Part 52 that certifies the design. Appendix D to Part 52 contains the DCR for the AP1000 Design. See 10 C.F.R. Part 52, Appendix D. Tier 1 means:

The portion of the design related information contained in the generic DCD that is approved and certified by this appendix (Tier 1 information). The design descriptions, interface requirements, and site parameters are derived from Tier 2 information. Tier 1 information includes;

1. Definitions and general provisions;
2. Design Descriptions;
3. Inspections, tests, analysis, and acceptance criteria (ITAAC);
4. Significant site parameters; and
5. Significant interface requirements.

See 10 C.F.R. Part 52, Appendix D Section II, D.

Tier 2 means:

The portion of the design-related information contained in the generic DCD that is approved but not certified by this appendix (Tier 2 information). Compliance with Tier 2 is required, but generic changes to and plant-specific departures from Tier 2 are governed by Section VIII of this appendix. Compliance with Tier 2 provides a sufficient, but not the only acceptable, method for complying with Tier 1. Compliance methods differing from Tier 2 must satisfy the change process in Section VIII of this appendix. Regardless of these differences, an applicant or

(. . .continued)

review is completed, the license cannot be issued.

A licensing board considering a COL application referencing a design certification application might conclude the proceeding and determine that the COL application is otherwise acceptable before the design certification rule becomes final. *In such circumstances, the license may not issue until the design certification rule is final*, unless the applicant requests that the entire application be treated as a 'custom' design.

Commission Policy Statement on Conduct of New Reactor Licensing Proceedings, Final Policy Statement, 73 Fed. Reg. 20,963, 20,972-73 (Apr. 17, 2008) (emphasis added).

licensee must meet the requirement in Section III.B of this appendix to reference Tier 2 when referencing Tier 1. Tier 2 information includes:

1. Information required by §§ 52.47(a) and 52.47(c), with the exception of generic technical specifications and conceptual design information;
2. Supporting information on the inspections, tests, and analyses that will be performed to demonstrate that the acceptance criteria in the ITAAC have been met; and
3. Combined license (COL) action items (COL license information), which identify certain matters that must be addressed in the site-specific portion of the final safety analysis report (FSAR) by an applicant who references this appendix. These items constitute information requirements but are not the only acceptable set of information in the FSAR. An applicant may depart from or omit these items, provided that the departure or omission is identified and justified in the FSAR. After issuance of a construction permit or COL, these items are not requirements for the licensee unless such items are restated in the FSAR.
4. The investment protection short-term availability controls in Section 16.3 of the DCD.

10 C.F.R. Part 52, Appendix D, Section II.E. As defined above, both Tier 1 and Tier 2 information have been approved by the NRC in Appendix D. Petitioners object to the NRC two-tier structure. They note that uncertified Tier 2 components interact with certified Tier 1 components, rendering certified Tier 1 components essentially unapproved. Petition at 10. But Petitioners are mistaken. While it is true that Tier 1 components are certified and Tier 2 components are not certified, both Tiers are approved. 10 C.F.R. Part 52, Appendix D, Sections II, D-E. Any “interaction” between Tier 1 and Tier 2 information that Petitioners allege in no way compromises the approved and certified status of Tier 1 information.

Petitioners conclude that “[t]he lack of information about the basic design and operating requirements for the AP1000 Revision 16 do not allow Petitioners to conduct a full and meaningful technical and safety review of VEGP Units 3 and 4.” Petition at 11. But Petitioners do not appear to take issue with any of the aspects of the revision to the AP1000 rule; they simply dispute the fact that the design certification rulemaking is not yet complete. As stated by the Commission in a different proceeding, “[a] specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed but not approved [10 C.F.R. §

52.55(c)] and Petitioners may not challenge Commission regulations in licensing proceedings. [10 C.F.R. § 2.335(a)].” See *Progress Energy Carolinas* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, slip op. (2008). Proposed Contention MISC-1 is a challenge to § 52.55(c) and is thus a challenge to Commission regulations. Since Petitioners are attempting to challenge a rule through this contention, and do not comply with the 10 C.F.R. § 2.335 procedure for bringing such a challenge, this contention is not admissible.

3. Conclusion

Since Petitioners are attempting to challenge a rule, and have not identified a material dispute with the Applicant, this contention is inadmissible for failure to comply with 10 C.F.R. §§ 2.309(f)(1)(vi) and 2.335.

B. Petitioners’ Second Proposed Contention

TC2 (AP1000 Revision 17): SNC’s COLA is incomplete because many of the major safety components and 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 incorporated 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.

Petition at 11.

In Proposed Contention 2, which the Staff will refer to hereinafter as MISC-2, Petitioners contend that SNC’s COLA is incomplete because major safety components and procedures have either been omitted or are conditional at this time and that SNC is required to adopt AP1000 Revision 17 by reference or resubmit its COLA as a plant-specific design. *Id.* at 11-12. Petitioners conclude that

[t]he deficiencies in the COLA are many and varied, with much of the technical descriptions of major components of the plant subject to change. The unresolved issues in basic design and operating requirements for the AP1000

reactor found in Revision 16 have been pushed into Revision 17. To date, there is no timetable for the certification of the new revision. Regardless of whether the reactor components would be certified or not at some time in the future, the COLA does not contain information about major design and operational components necessary to permit Petitioners to conduct a full and meaningful technical and safety review of VEGP Units 3 and 4.

Id. at 13-14.

Staff Response: Petitioners challenge the Commission practice of resolving generic issues in rulemaking rather than in individual litigation and 10 C.F.R. § 52.55(c), which allows applicants to reference a certified design that has been docketed but not approved. These challenges, which do not comply with 10 C.F.R. § 2.335, cannot form the basis for an admissible contention. Furthermore, as discussed above, a contention is inadmissible if it fails to contain sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact and does not include references to the specific portions of the application that a petitioner may dispute. *See Pacific Gas and Electric Co. (Diablo Canyon ISFSI), CLI-08-01, 67 NRC 1, 8 (2008)*. For the reasons explained below, this contention is inadmissible because it is a challenge to NRC regulations and it fails to demonstrate a material dispute with the Applicant.

1. Proposed Contention MISC-2 Challenges NRC Regulations.

The Petitioners state that the alleged deficiencies in Revision 16 they identified regarding Proposed Contention MISC-1 are relevant to their argument supporting Proposed Contention MISC-2. Therefore, they incorporate by reference “the deficiencies in Revision 16 addressed in [Proposed Contention MISC-1].” *Id.* at 11. In response, the Staff incorporates by reference the Staff response to Petitioners’ allegations of deficiencies in Revision 16. *See, supra*, I.A.1, I.A.2. Petitioners also note throughout their support for Proposed Contention MISC-2 that, “similar to Revision 16, Revision 17 is neither final nor complete – with numerous design and operational procedures still in a state of flux.” But, as discussed above, Commission

policy and federal case law allow the NRC to resolve generic issues in rulemaking rather than through litigation in individual cases. See Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008); *Massachusetts v. U.S.*, 552 F.3d 115, 119 (1st Cir. 2008). Moreover, as stated by the Commission in a different proceeding, “[a] specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed but not approved [10 C.F.R. § 52.55(c)] and Petitioners may not challenge Commission regulations in licensing proceedings. [10 C.F.R. § 2.335(a)].” See *Progress Energy Carolinas* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, slip op. (2008). Proposed Contention MISC-2 is a challenge to § 52.55(c) and is thus a challenge to Commission regulations. Petitioners have not invoked the correct process for challenging Commission regulations; thus, their dispute with the Commission’s procedure for determining generic design issues is impermissible here. See 10 C.F.R. § 2.335(a).

Petitioners allege that, aside from alleged safety inadequacies common to both Revision 16 and Revision 17, Revision 17 contains numerous uncertified components, including turbine design changes, physical security, human factors engineering, responses to seismic activities and adverse weather conditions, radiation protection measures, technical specifications for valves and piping, accident analyses, and aircraft impact. Petition at 13. But Petitioners have not disputed any analysis contained in Revision 17. The mere fact that the NRC is currently reviewing Revision 17 of the AP1000 design certification amendment provides no basis for an admissible contention. As described at length above, the generic rulemaking with regard to the AP1000 design is ongoing, and federal case law, as well as Commission policy, explicitly permits this approach to design certification. See, *supra* at 31, 36.

Petitioners argue that, since the Applicant has not yet adopted Revision 17 or resubmitted its COLA as a plant-specific design, Petitioners are unable to conduct a meaningful review of the COLA, and they will be incapable of conducting such review until they know

whether the Applicant plans to adopt Revision 17. They assert that the NRC is no longer reviewing Revision 16 and, since the Applicant has not adopted Revision 17, the NRC is no longer reviewing the DCD version that the COLA incorporates. Petition at 12. While it is technically true that Revision 16 will no longer be reviewed, Petitioners misunderstand the design certification amendment process. Following an acceptance review, the Staff docketed for review a proposed amendment (Revision 16) to the certified Westinghouse AP1000 design (Revision 15, 10 C.F.R. Part 52, Appendix D). See Westinghouse Electric Company; Acceptance for Docketing of a Design Certification Rule Amendment for the AP1000 Design,” 73 Fed. Reg. 4926 (Jan. 28, 2008). Revision 17 is merely an update to that amendment application. While SNC has not incorporated Revision 17 into its COLA, its incorporation of the (Revision 16) docketed AP1000 design certification amendment is explicitly permitted under 10 C.F.R. § 52.55(c). While Petitioners appear to be correct in arguing that SNC will likely amend its application to reference Revision 17, Petitioners have not set out any statutory, regulatory, or other basis as to why review of the application cannot continue. Thus, Proposed Contention MISC-2 is again simply an impermissible attack on the Part 52 process.

Petitioners also note that their review of Revision 17 is hindered because the entire application has not yet been made publicly available. Petition at 13. It is true that Revision 17 of the AP1000 design certification amendment was not publicly available when Petitioners filed their Petition for Intervention. But it is now available to the public, curing this portion of the Petitioners’ challenge. Revision 17 of the AP1000 design certification amendment was published on the NRC public website on November 25, 2008.³⁶ Moreover, before Revision 17

³⁶ See <http://adamswebsearch2.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML083230868>.

was published on the NRC's public website, Petitioners had not availed themselves of procedures to access Revision 17 which was temporarily withheld as SUNSI.³⁷

2. Proposed Contention MISC-2 Does Not Demonstrate a Material Dispute with the Applicant.

A contention that simply alleges that a matter ought to be considered does not provide the requisite basis for an admissible contention. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993). As in Proposed Contention MISC-1, Petitioners have failed to provide the requisite specificity as to what they wish to litigate. Petitioners argue that

[o]n its face, Revision 17 (and thus the COLA) is incomplete, as there remain[] a number of serious safety inadequacies in the AP1000 design that have not been satisfactorily addressed. In addition to the still unresolved issues and uncertified components in Revision 16 set forth in contention TC1,³⁸ the uncertified components specifically addressed in Revision 17 include the turbine design changes, physical security, human factors engineering, responses to seismic activities and adverse weather conditions, radiation protection measure, technical specifications for valves and piping, accident analyses, and aircraft impact.

Petition at 13. But Petitioners have not articulated any dispute with the alleged uncertified portions of Revision 17. They do not challenge the adequacy of the discussion of turbine design changes, physical security, human factors engineering, responses to seismic activities and adverse weather conditions, radiation protection measure, technical specifications for valves and piping, accident analyses, and aircraft impact.³⁹ Thus, Petitioners have not expressed a

³⁷ The Staff notes that the process for a petitioner or intervenor to review sensitive unclassified non-safeguards information was described in the Commission's Notice of Hearing. See 73 Fed. Reg. 53446, 53448 (September 16, 2008).

³⁸ According to Petitioners' MISC-1, the unresolved issues in Revision 16 include containment, control room set up, operating decision-making, seismic qualifications, fire protection areas, heat removal, human factors engineering design, plant personnel requirements, alarm systems, and pipe and conduit requirements. Petition at 13.

³⁹ The Staff's response to Petitioners' allegations of omission in Revision 16, listed in note 39, is (continued. . .)

material dispute with the Applicant. Moreover, Petitioners object to the incomplete design certification, noting that, “[t]hese [incomplete Tier 2] components interact with Tier 1 components and each other to a significant degree.” *Id.* But while it is true that Tier 1 components are certified and Tier 2 components are not certified, both Tiers are approved. 10 C.F.R. Part 52, Appendix D, Sections II, D-E.⁴⁰ Any “interaction” between Tier 1 and Tier 2 information that Petitioners allege in no way compromises the approved and certified status of Tier 1 information.

Petitioners’ arguments regarding SNC’s delay in adopting Revision 17 of the AP1000 design certification amendment do not demonstrate any material dispute with the Applicant. Likewise, Petitioners have not pointed to any deficiencies in the COLA independent of the challenges to the AP1000 DCD, which, as the Staff has shown above, are not admissible. Without identifying particular points of dispute with the Applicant, Petitioners have not met the requirement in 10 C.F.R. § 2.309(f)(1)(vi).

3. Conclusion

Proposed Contention MISC-2 is inadmissible because it is a general challenge to the Part 52 process, and specifically attacks 10 C.F.R. § 52.55(c), which permits a COLA to reference a docketed, but uncertified standard design. Furthermore, the contention does not satisfy 10 C.F.R. § 2.309(f)(1)(vi) because Petitioners have not articulated a genuine dispute of law or fact, nor have they articulated the supporting reasons for any purported dispute. Thus, Proposed Contention MISC-2 is inadmissible.

(. . .continued)

found, *supra*, at I.A.1.

⁴⁰ See, *supra*, III.A.2 for a full explanation of the feature of the two-tier rule structure.

C. Petitioners' Third Proposed Contention

PROPOSED CONTENTION SC1 (Disposal of LLRW): 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 offsite waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.

Petition at 14.

In Proposed Contention 3, which the Staff will refer to hereinafter as SAFETY-1, the Petitioners state that the FSAR "contains no explanation of the specific waste management actions SNC will take if there is still no waste disposal facility available" after closure of the Barnwell facility, and "offers merely a cursory discussion of the purpose of a 'process control program' (the 'PCP') for radioactive waste management," citing COLA Part 2 FSAR Section 11.4.6, "Combined License Information for Solid Waste Management System Process Control Program." Petition at 15. As a result, Petitioners claim that the FSAR 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)". In support of their contention, the Petitioners further state that "an Atomic Safety Licensing Board has directly contemplated this situation" and admitted a similar contention in the North Anna Unit 3 licensing proceeding. *Id.* at 14.

Next, Petitioners state that the "proposed storage, which is inherently temporary in nature, does not equate to the definitive nature of 'disposal' as such term is employed in Section 11.4.6 of the FSAR." *Id.* at 15. Petitioners further allege that the FSAR omits any discussion of disposal procedures in the absence of an offsite storage location. *Id.* at 15.

Finally, Petitioners claim that "the FSAR omits a discussion of the health impacts on SNC employees from the additional LLRW storage." *Id.* at 16.

Based on these claims, Petitioners contend that the COLA is "incomplete." *Id.* at 14.

Staff Response: Proposed Contention SAFETY-1 is inadmissible for the following reasons, which are further discussed below. First, proposed Contention SAFETY-1 is inadmissible because it erroneously states that the FSAR fails to explain waste management actions SNC will take in the absence of an offsite disposal facility. Second, proposed Contention SAFETY-1 distorts the meaning of the term “disposal” in alleging that SNC’s storage of LLRW is required to meet NRC regulations related to disposal. Third, proposed Contention SAFETY-1 incorrectly assumes that the FSAR must include a separate discussion of the health impacts of LLRW storage on SNC employees.

1. Proposed Contention SAFETY-1 is Inadmissible Because It Erroneously States That the FSAR Fails to Explain the Waste Management Actions SNC Will Take In the Absence of an Offsite Disposal Facility.

To the extent that proposed Contention SAFETY-1 is considered a contention of omission, it fails because the purportedly missing analysis is indeed present; i.e., Petitioners err in alleging that “the FSAR does not address the long term storage procedures or realistically consider the size and space limitations of the existing storage facilities.” *Id.* at 16.

In fact, COLA Part 2 FSAR Section 11.4.6.3 does provide a discussion regarding the “Long Term Onsite Storage Facility.” This portion of the FSAR specifically states:

[s]torage space for six-month's volume of packaged waste is provided in the radwaste building. Radioactive waste generated by VEGP Units 3 and 4 will normally be shipped to a licensed disposal facility. However, 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.

FSAR at 11.4-2. In addition to the standard six-month capacity of the Unit 3 and 4 radwaste building for storage of Class A, B and C waste, the Applicant has indicated that any excess, packaged waste can be stored in the Low Level Radwaste Storage Facility currently planned for storage of waste from VEGP Units 1 and 2. FSAR at 11.4-2.

Petitioners also erroneously assert that the “FSAR 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).” Petition at 14. However, the FSAR does not state that LLRW from Units 3 and 4 will be stored only in the existing storage facilities. Pursuant to its license renewal application for continued operation of Units 1 and 2, SNC is developing design concepts to provide for onsite 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 offsite 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 (SNC 2007d).

NUREG-1437, Supplement 34, at 2-14.⁴¹ Additional specifications regarding this planned LLRW storage are provided in Vogtle Electric Generating Plant- Units 1&2: Conceptual Design for a Low Level Radwaste Pad at Plant Vogtle,⁴² which was also submitted in connection with the license renewal application for Vogtle Units 1 and 2. It is this “planned” additional storage capacity for Units 1 and 2 to which SNC refers in the COLA FSAR at 11.4-2.

Also, Petitioners seem to believe that admission of similar, almost identical, contentions in the North Anna and Bellefonte proceedings gives some weight to their current contention. Petitioners indicate that proposed Contention SAFETY-1 should be admitted, in part, because:

An Atomic Safety Licensing Board has directly contemplated this situation. In the proceeding for licensing of North Anna Unit 3, the board admitted a contention alleging that the ‘FSAR should have explained [the nuclear operating company’s] plan for complying with NRC regulations governing the management of LLRW in the

⁴¹ Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 34, Regarding Vogtle Electric Generating Plant, Units 1 and 2 Final Report (2008).

⁴² ADAMS Accession No. ML073240581.

absence of an offsite disposal facility.’ *Virginia Electric and Power Company d/b/a/ Dominion Virginia Power and Old Dominion Electric Cooperative*, ASLBP No. 08-863-01-COL, Memorandum and Order (Ruling on Petitioners’ Standing and Contention) (August 15, 2008) at 21; *see also Tennessee Valley Authority*, ASLBP No. 08-864-01-COL-BD01, Memorandum and Order (Ruling on Standing and Contention Admissibility) (September 12, 2008) at 57-60, admitting a similar contention.

Id. at 13-14.

Under Commission precedent, however, the fact that one licensing board has admitted a contention is not an adequate basis for admission of a similar contention in a different proceeding. Each licensing board has the responsibility for judging factual and legal disputes between parties. *See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-95-16, 42 NRC 221, 225 (1995). While previous board decisions may be persuasive authority, the decisions of boards in prior, unrelated COLA proceedings should not be treated as binding precedent. Therefore, Petitioners’ reference to the decisions of prior Licensing Boards in admitting similar contentions on different applications is insufficient to provide support for the current contention.

More importantly, the argument for admitting Proposed Contention SAFETY-1 in this proceeding based on its admission in prior proceedings ignores the fact that the COLAs are different. The COLA for North Anna Unit 3 incorporates by reference the Design Control Document (DCD) for the ESBWR. *See, North Anna 3, Combined License Application Part 2: Final Safety Analysis Report, Revision 0, November 2007.* The ESBWR DCD states that the radwaste building is designed to hold six months⁴³ of packaged waste and contemplates that

⁴³ The six-month capacity considered by these applications includes storage of Class A, B and C waste generated within a six-month period. While there is currently no facility available to the Applicants in the Vogtle, Bellefonte and North Anna proceedings for disposal of Class B and C waste, several facilities are available to them for disposal of Class A waste. Therefore, assuming offsite disposal of all (continued. . .)

additional storage facilities may be required pursuant to NUREG-0800. See, ESBWR Design Control Document, Tier 2, Chapter 11, Radioactive Waste Management, at 11.4-1-2. The North Anna Unit 3 COLA further indicates, as an addition to the language of the ESBWR DCD, that the “site does not utilize any storage facilities to support plant operation.” North Anna Unit 3 COLA Part 2, FSAR, Section 11.4.1, at 11-6. Thus, the COLA for Vogtle Units 3 and 4 is distinguishable from the COLA for North Anna Unit 3, in that, unlike the North Anna COLA, the Vogtle COLA specifically provides for onsite storage of LLRW in addition to the primary six-month capacity of the radwaste building.

In the Bellefonte proceeding, a similar contention was admitted for consideration both as an environmental contention and as a safety contention. The COLA for Bellefonte can be distinguished from both the Vogtle and North Anna COLAs in that it does not reference an ESP, hence the admission of the contention with respect to the environmental allegations. The Bellefonte COLA can be further distinguished from Vogtle (and compared to the North Anna COLA) in that it does not consider additional storage capacity in excess of that designated in the DCD for storage of waste generated within a six month period. Thus, although a similar contention was admitted in both the North Anna and Bellefonte proceedings, neither of those COLAs contain the detailed information regarding additional LLRW storage capacity which is included in the Vogtle COLA.

Also, in support of the Vogtle COLA, SNC has requested a license under 10 C.F.R. Part 30, which would authorize it to possess and store the low-level radioactive waste that is the

(. . .continued)

Class A waste, there would be storage capacity for Class B and C waste in excess of that generated within a six month period.

subject of proposed Contention SAFETY-1 if the Application is ultimately granted. Application, Part 1, at 1-14. The material would be stored in accordance with the requirements of 10 C.F.R. Part 20. See, e.g., 10 C.F.R. §§ 20.1801-1802. The Petitioners have not offered any facts or arguments to suggest that the Applicant will not qualify for a license under 10 C.F.R. Part 30.

Therefore, with respect to the Petitioners' allegations that the COLA fails to consider how SNC will comply with NRC regulations governing long-term storage of LLRW, the Petition fails to satisfy § 2.309(f)(1)(vi) and it is inadmissible.

2. Proposed Contention SAFETY-1 Distorts the Meaning of the Term "Disposal" As Used In Section 11.4.6 of the FSAR.

Petitioners assert that the onsite storage of LLRW contemplated by the COLA "does not equate to the definitive nature of 'disposal' as such term is employed in Section 11.4.6 of the FSAR." Petition at 15. Petitioners suggest that the preparation of LLRW for disposal and then storage of that LLRW onsite for long periods are being used as a replacement for disposal without, in fact, being the equivalent of disposal. In support of this proposition, Petitioners cite Section 11.4.6 of the FSAR regarding the Process Control Program which describes the operational controls used for dewatering and solidification of waste.

Its purpose is to provide the necessary controls such that the final disposal waste product meets applicable federal regulations (10 CFR Parts 20, 50, 61, 71, and 49 CFR Part 173), state regulations, and disposal site waste form requirements for burial at a low level waste (LLW) disposal site that is licensed in accordance with 10 CFR Part 61. FSAR (Revision 0), Section 11.4.6 at 11.4-1.

Petition at 15. In this context, however, "disposal" is an adjective used to describe the form of the waste product which is created as a result of the PCP. It does not indicate that long-term storage of this waste is the equivalent of disposal.

Further, Petitioners fail to demonstrate that the portion of Proposed Contention SAFETY-1 regarding disposal of LLRW is within the scope of this proceeding. Petitioners assert that "the

FSAR fails to consider how SNC will comply with NRC regulations governing storage and *disposal* of LLRW in the event an offsite waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.” Petition at 14 (emphasis added). Although the Contention challenges the sufficiency of the COLA with respect to disposal of LLRW, Petitioners have failed to provide any references to regulatory requirements showing that the Applicant is required to address disposal of LLRW in its COLA beyond providing a mechanism for processing and packaging waste in preparation for disposal.

The Petitioners have also failed to demonstrate that the Applicant is required to obtain, or demonstrate the ability to obtain, access to an offsite disposal facility prior to being granted a license to construct or operate a nuclear generating facility. With respect to disposal of LLRW, the requirements for the contents of COLAs do not state that a COLA applicant must describe how it plans to dispose of LLRW. See 10 C.F.R. §§ 52.79, 52.80. Although Petitioners frame their contention as one of omission, NRC regulations do not require an Applicant to ensure adequate offsite disposal for any generated LLRW prior to being granted a construction or operating license. In the absence of a regulatory requirement that this information be included within the COLA, it cannot be said that such information has been omitted or that the FSAR is incomplete without it. This mistaken presumption cannot form part of an acceptable basis for proposed Contention SAFETY-1 in accordance with 10 C.F.R. § 2.309(f)(1)(ii). Therefore, with respect to the Petitioners’ allegations that the COLA fails to consider how SNC will comply with NRC regulations governing disposal of LLRW, the Petitioners fail to provide an acceptable basis to satisfy § 2.309(f)(1)(ii) and the portion of the Contention pertaining to disposal of LLRW is inadmissible for that reason. Also, because a COLA is not required to address final disposal of LLRW, that portion of Proposed Contention SAFETY-1 cannot be said to be material to the findings that the NRC must make in the COLA proceeding, fails to satisfy § 2.309(f)(1)(iv), and is inadmissible.

Furthermore, to the extent that the Petitioners may allege that the form of waste product created through the PCP will not conform to the requirements of any future licensed LLRW disposal facility, that proposition is speculative and is not material to the finding the NRC must make to support the action involved in the present proceeding. In addition, the solid waste management system designed by SNC for use at the Vogtle Units 3 and 4 facility provides for flexibility to meet both current and future waste packaging requirements which may be imposed either by a licensed land disposal facility or by changes to NRC regulations under Part 61. Accordingly, that this assertion in the Petition fails to satisfy § 2.309(f)(1)(iv) with respect to proposed Contention SAFETY-1, and it is inadmissible.

3. Proposed Contention SAFETY-1 Incorrectly Assumes the FSAR Must Include a Separate Discussion of Health Impacts of LLRW Storage on SNC Employees.

To the extent that Contention SAFETY-1 may be intended to raise a health and safety issue regarding impacts of LLRW storage on SNC employees, Petitioners provide no information demonstrating that any genuine, material dispute exists. Petitioners assert that “[t]he increase in onsite LLRW will increase health and safety risks for SNC employees who must handle, package, and inspect the materials during storage. Safety and security issues of extended onsite storage and potential onsite disposal must therefore be addressed in the FSAR.” Petition at 16. In making this allegation, Petitioners fail to note that the AP1000 Design Control Document (DCD)⁴⁴, which is incorporated by reference into the COLA, clearly indicates that the solid waste management system, including onsite storage, is “designed according to NRC Regulatory Guide 1.143⁴⁵ to meet the requirements of General Design Criterion (GDC)

⁴⁴ AP1000 Design Control Document, Revision 16, 11.4.1.3 (page 11.4-2).

⁴⁵ Design Guidance for Radioactive Waste Management Systems, Structures, and Components (continued. . .)

60.” This Regulatory Guide specifically notes that “the design and construction of radioactive waste management ... systems should provide assurance that radiation exposures to operating personnel and to the general public are as low as is reasonably achievable.” Id at 1.143-4. The DCD also provides for installation of a radiation monitoring system (RMS) which is intended to provide a “continuous indication of the radiation environment in plant areas where such information is needed.” DCD, Section 11.5, at 11.5-1. Specifically, the Radwaste Building Exhaust Radiation Monitor is to be installed to measure “the concentration of radioactive materials in the exhaust air from the radwaste building.” DCD Section 11.5.2.3.2, at 11.5-10. In addition, the COLA provides specific instructions for radiation exposure monitoring of employees. Section 12.3 of Part 2 FSAR, at 12.3-1-5. Thus, radiation exposure to operating personnel is addressed in the COLA.

Petitioners have failed to provide any facts, expert opinions, references or sources to indicate that conformance with the proposed monitoring program is insufficient to protect operating personnel from long-term radiation exposure due to onsite storage of LLRW and that additional monitoring is necessary. Since proposed Contention SAFETY-1 contains no information demonstrating that any genuine, material dispute with the application exists regarding the health and safety of SNC employees, it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and the Contention is inadmissible for that reason.

4. Conclusion

Proposed Contention SAFETY-1 is inadmissible because it is framed as a contention of omission and the purportedly missing analysis is present in the COLA FSAR at Section

(. . .continued)

Installed in Light-Water-Cooled Nuclear Power Plants. NRC Regulatory Guide, Rev 2, November 2001.

11.4.6.3. Furthermore, the proposed contention does not satisfy 10 C.F.R. § 2.309(f)(1)(ii) with respect to the allegation that SNC LLW storage must comply with disposal procedures in the absence of an offsite storage location. The proposed contention also fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi), because Petitioners have not articulated a genuine issue of law or fact, nor have they articulated the supporting reasons for any purported dispute regarding health impacts on SNC employees from the additional LLRW storage. Thus, Proposed Contention SAFETY-1 is inadmissible, and should be denied.

CONCLUSION

For the reasons discussed above, the NRC Staff submits that the Petition should be denied for failure to proffer an admissible contention.

Respectfully submitted,

/Signed (electronically) by/

Ann P. Hodgdon
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1587
Ann.Hodgdon@nrc.gov

/Executed in accordance with 10 CFR § 2.304(d)/

Sarah W. Price
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-2047
Sarah.Price@nrc.gov

/Executed in accordance with 10 CFR § 2.304(d)/

Carol H. Lazar
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1484
Carol.Lazar@nrc.gov

Dated at Rockville, Maryland
this 12th day of December, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
SOUTHERN NUCLEAR OPERATING)
COMPANY) Docket Nos. 52-025 and 52-026
)
Vogtle Electric Generating Plant)
(Units 3 and 4))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO 'PETITION FOR INTERVENTION,' "dated December 12, 2008, have been served upon the following by the Electronic Information Exchange, this 12th day of December, 2008:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Paul.Bollwerk@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAmail@nrc.gov

Administrative Judge
James F. Jackson
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: James.Jackson@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

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

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

Kathryn M. Sutton, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave, N.W.
Washington, DC 20004
E-mail: ksutton@morganlewis.com

Peter D. LeJeune, Esq.
M. Stanford Blanton, Esq.
Balch & Bingham LLP
1710 6th Avenue North
Birmingham, AL 35203
E-mail: plejeune@balch.com
sblanton@balch.com

/Signed (electronically) by/

Ann P. Hodgdon
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1587
Ann.Hodgdon@nrc.gov