UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of	)	
Southern Nuclear Operating Company, Inc.	)	Docket Nos. 52-025 and 52-026
Vogtle Electric Generating Plant, Units 3 and 4	)	ASLBP No. 09-873-01-COL-BD01
	)	December 23, 2008

PETITIONERS' REPLY TO SNC ANSWER OPPOSING PETITION TO INTERVENE AND NRC STAFF ANSWER TO PETITION FOR INTERVENTION

Pursuant to 10 C.F.R. § 2.309(h), petitioners, 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")[1], hereby submit this Reply in response to the Southern Nuclear Operating Company's ("SNC") Answer Opposing Petition to Intervene (the "SNC Answer") and the Nuclear Regulatory Commission ("NRC" or the "Commission") Staff Answer to Petition for Intervention (the "Staff Answer"), each dated December 12,

[1] Atlanta WAND, BREDL, CSC, Savannah Riverkeeper, and SACE, are herein collectively referred to as "Petitioners".

2008. As asserted below, Petitioners provided sufficient basis and specificity in their Petition for Intervention, dated December November 17, 2008, in accordance with 10 C.F.R. § 2.309. Accordingly, the Petition for Intervention (the "Petition") should be accepted in its entirety, and the following contentions should be admitted:

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

2. MISC-2: 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 AP 1000 Revision 17 ("Revision 17"), SNC is now required to either adopt Revision 17 or resubmit its COLA as a plant-specific design. Either course of action will require substantial changes to the COLA, which as currently drafted incorporates AP 1000 Revision 16 ("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.

3. SAFETY-1: SNC's COLA is incomplete because the Final Safety Analysis Report (the "FSAR") fails to consider how SNC will comply with NRC regulations governing storage and disposal of Low Level Radioactive Waste ("LLRW") in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.

PETITIONERS' PROPOSED CONTENTIONS MISC-1 AND MISC-2 ARE ADMISSIBLE.

SNC and the NRC Staff argue that Contentions MISC-1 and MISC-2 should be rejected because they challenge NRC policy regarding the conduct of Combined License ("COL") proceedings, and because they fail to satisfy NRC's criteria for admissibility of

contentions in 10 C.F.R. § 2.309(f)(1).[2] They are wrong on both counts. Contentions MISC-1 and MISC-2 are "classic" contentions of omission, which may be raised by "alleging that certain necessary safety-related steps or analyses have not been taken …"[3]

The COLA is Deficient With Respect to Certain Design Components

Contentions MISC-1 and MISC-2 demonstrate that the Vogtle COL application (the "COLA") is deficient with respect to certain specific design components, because it fails to fulfill two necessary procedural requirements that must be fulfilled before the adequacy of the description of these components in the COLA may be meaningfully reviewed. First, the design components listed in the contentions have not been conclusively approved in the separate design certification rulemaking proceeding that has been designated by NRC for their resolution.[4] Second, the final AP 1000 design, as certified and as potentially modified through the design certification process, has not been adopted by SNC.[5] Unless and until these procedural steps have been taken, SNC's COLA remains inadequate with respect to the design components listed in Contentions MISC-1 and MISC-2. Therefore the contentions are admissible, and may be resolved or

[2] SNC Answer at 11-16; Staff Answer at 23-39

[3] *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 206 (2007) ("LBP-07-14")

The NRC Staff confuses the contentions with a request for a stay of the licensing proceeding: "Petitioners have not set out any statutory, regulatory, or other basis as to why review of the application cannot continue." Staff Answer at 37. The point of the contentions is that Petitioners cannot meaningfully review the COLA because of substantial omissions from the content of the application. The contention should be admitted and held in abeyance pending completion of the COL proceeding. If, at that time, the COLA has not been amended to incorporate a certified AP1000 design or has not otherwise resolved the absence of a certified design, the Atomic Safety and Licensing Board (the "ASLB") should rule for Petitioners on the merits of the contention.

[4] *See* Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972-73 (April 17, 2008) (the "Policy Statement")

[5] *Id.* at 20,973

dismissed as moot only if and when SNC can demonstrate that the two procedural requirements have been fulfilled. *See* LBP-07-14:

> Responding that the actions will be taken later does not defeat the contention for prematurity. Instead, it merely sets the stage for facility proponents later to bring forward, as they routinely do, a solution that allegedly cures the deficiency; they then move to dismiss the contention, triggering in turn a period during which the Petitioners can amend the original contention to challenge the solution's substance."

66 NRC at 206 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)).[6]

A different panel of the ASLB recently admitted a virtually identical contention to MISC-1, and confirmed its consistency with NRC's Policy Statement.[7] That panel admitted the contention with respect to "the specifically identified omissions" that were delineated in the contention, referred the specific omissions raised by the contention to the NRC Staff, and held litigation of the contention in abeyance pending completion of the design certification rulemaking.[8] As the ASLB panel explained in admitting the contention:

> We find that Petitioners' Contention TC-1 is not a challenge to the AP1000 design review process, but rather a challenge to the Application itself.
>
> This situation has been directly contemplated by the Commission. In CLI-08-15 [an earlier decision by the Commission refusing to suspend the *Shearon Harris* licensing proceeding until certification of the amended AP1000 design], the Commission directed Petitioner and, indirectly, this Board that if Petitioner identified specific omissions in the COLA, those omissions should be addressed

[6] Figure 1 of the SNC Answer confirms that *none* of the specific design features listed in Petitioners' contentions have been finally certified; for each feature, the vendor has sought to modify the design in Revisions 16 and 17. SNC Answer at 18. Revision 17 has not even been incorporated into the COLA yet, let alone been approved in a design certification rulemaking. Until these specific design issues are resolved and the resolution incorporated into the COLA, Petitioners' contentions will remain admissible.

[7] *Progress Energy Carolinas, Inc.* (Combined License Application for Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-08-21, 68 NRC __ (October 30, 2008) ("LBP-08-21")

[8] *Id.*, slip op. at 9

in a contention to this Board which, in turn, "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." Memorandum and Order, CLI-08-15, 68 NRC __, __ (slip op. at 4) (citing to the Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,972 (Apr. 17, 2008)). In the Commission's Final Policy Statement, they explained the process as follows:

> We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. 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.

73 Fed. Reg. at 20,972.

Here, the contention does not challenge a design matter related to the AP1000 DCD to the extent previously certified, for if it did it would clearly be an impermissible challenge to agency regulations. Rather, Petitioner has set forth facts indicating specific omissions from the COLA that fall within the scenario contemplated by the Commission. We find both Applicant and Staff to have failed to provide information regarding whether or not the asserted omitted material was indeed omitted in the COLA, nor did either provide information indicating whether such allegedly omitted information is required to be in a COLA. Thus, we find Petitioner's asserted omissions to be uncontroverted, and therefore admissible.[9]

LBP-08-21, slip op. at 8-9 (emphasis added).

The ASLB panel's reasoning is equally applicable in this case. The "scenario contemplated by the Commission" is that COLAs may not receive final approval until the designs on which they rely have been certified and adopted or modified by the COL

[9] In this proceeding, the COLA references un-certified design components, and omits information regarding the certification of those components. Figure 1 of the SNC Answer, which provides cites in the FSAR to the uncertified components, does not constitute an effective assertion that the omitted information can in fact be found in the COLA. As set forth in note 6, Figure 1 instead confirms that the design components have not been certified, and thus reinforces Petitioners' assertion the certain material is omitted from the COLA.

applicants.[10] A COLA that references un-certified design elements is therefore deficient as a matter of law with respect to its omission of information regarding the certification of those components. Thus, while it may be appropriate to hold the contention in abeyance pending the completion of the certification process or adoption of a modified design by SNC, it is not appropriate to dismiss the contention.

MISC-1 and MISC-2 are Contentions of Omission That Allege the COLA is Deficient

SNC and the NRC Staff argue that Contentions MISC-1 and MISC-2 are not actually contentions of omission, but contentions that improperly challenge the NRC regulation which allows COL applicants to rely on un-approved design certification applications.[11] Nothing about Contentions MISC-1 or MISC-2 challenges SNC's right to submit a COLA that references an un-approved design certification application, however. What the contentions *do* challenge is the adequacy of such a COLA to support a meaningful licensing review and meet the requirements for the issuance of a license. As the Policy Statement makes clear, a COLA may not be issued unless and until the certification rule for the underlying design has been issued.[12] The only exception to this requirement is where "the applicant requests that the entire application be treated as a 'custom' design,'" a circumstance that does not exist here.[13] Therefore, Petitioners

[10] 73 Fed. Reg. at 20,972-73

[11] SNC Answer at 15, citing *Duke Energy Carolinas, L.L.C.* (Combined License Application for William States Lee III Nuclear Station Units 1 & 2), LBP-08-17, __ NRC __, slip op. at 11-12 (Sept. 22, 2008) ("LBP-08-17") (citing 10 C.F.R. § 52.55(c)). *See also* NRC Answer at 34.

[12] 73 Fed. Reg. at 20,973

[13] *Id.*

respectfully submit that both SNC's argument and the ASLB's decision in LBP-08-17 are in error.[14]

Petitioners Are Not Required to Allege a Technical Deficiency in the COLA Proceeding

SNC and the NRC Staff argue that Contentions MISC-1 and MISC-2 are inadmissible because they do not show that the AP1000 application, as referenced by the COLA, is deficient in some technical respect.[15] In making this argument, SNC relies on language in the Policy Statement which allows ASLBs to admit contentions that raise technical challenges to the adequacy of a design referenced in a COLA, and hold those contentions in abeyance pending their resolution in a rulemaking.[16] But while the Policy Statement is *permissive* with respect to the raising of technical challenges to standard designs in COL adjudications (if such contentions are held in abeyance pending completion of the design certification rulemaking), nothing in the Policy Statement *requires* hearing requesters to use COL adjudications to raise their specific technical concerns about the adequacy of a design certification application. Just as the Commission has reserved the right to address the adequacy of a design certification application in a rulemaking rather than in individual COL adjudications, so Petitioners have a corresponding right to raise their technical concerns about the general adequacy of the AP1000 design in the form of comments on the proposed AP1000 design certification rule, rather than in this COL adjudication. In the meantime, the question of whether a

[14] Petitioners respectfully submit that LBP-08-17 is in direct conflict with LBP-08-21, discussed above. This ASLB panel should follow the precedent set in LBP-08-21 and reject the reasoning of LBP-08-17, whose interpretation of Section 52.55(c) goes beyond the plain language of the regulation itself and is also inconsistent with NRC's Policy Statement.

[15] SNC Answer at 21; Staff Answer at 25-26

[16] SNC Answer at 19, citing 73 Fed. Reg. at 20,972

COLA that fails to rely on a certified design is capable of review for the purpose of determining whether it should be licensed is a material and admissible issue.[17]

PETITIONERS' PROPOSED CONTENTION SAFETY-1 IS ADMISSIBLE.

SNC and the NRC Staff assert that Contention SAFETY-1 should not be admitted because it fails to satisfy various sections of 10 C.F.R. § 2.309(f)(1), including section (iv) regarding materiality,[18] section (v) regarding support of the contention by facts or expert opinion,[19] and section (vi) regarding the existence of a dispute on a material issue of fact or law.[20] As explained below, these assertions are without merit. Moreover, each such assertion is merely a restatement of the underlying argument in both the SNC Answer and the NRC Answer – that SNC should not be required to set forth a complete and definitive explanation of its plans to comply with NRC regulations governing management of LLRW at the Vogtle Electric Generating Plant ("VEGP") site. Such an argument is illogical and stands counter to NRC guidance regarding storage of LLRW.[21]

Contention SAFETY-1 Satisfies the Admissibility Requirements Set Forth in 10 C.F.R. § 2.309(f)(1), Including Those Requirements Set Forth in Sections (iv), (v) and (vi)

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[17] Had the Commission decided to allow challenges to the adequacy of a design certification application in individual COL adjudications, it would be reasonable to require contentions challenging the COLA's reliance on the design to be specific with respect to the technical defects in the design. That is not the case, however. In the Policy Statement, the Commission decided that AP1000 design issues will be resolved in a rulemaking proceeding that is completely separate from individual COL adjudications, except for the fact that the rulemaking's results ultimately must be incorporated into the COLA that relies on the design before the COLA may be approved. Under the circumstances, any contention that challenges the sufficiency of a COLA for failure to show its reliance on a certified design raises a material licensing dispute and therefore must be admitted.

[18] SNC Answer at 27; Staff Answer at 47

[19] SNC Answer at 29

[20] SNC Answer at 28; Staff Answer at 48

[21] *See generally* NUREG-0800 and NUREG-1437

As noted by both SNC and the NRC Staff,[22] Contention SAFETY-1 is markedly similar to contentions admitted in the *North Anna* COL and *Bellefonte* COL proceedings.[23] In the *North Anna* COL proceeding, an ASLB panel (the "North Anna Board") found that the contention satisfied each of the admissibility requirements set forth in 10 C.F.R § 2.309(f)(1), including those requirements that SNC and the NRC Staff assert are unsatisfied in this proceeding.

First, SNC and the NRC Staff each allege that SAFETY-1 does not satisfy § 2.309(f)(1)(vi), which requires a petitioner to show "that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[24] As explained by the North Anna Board, SAFETY-1 asserts that the COLA fails to include the requisite information regarding LLRW management, and is accordingly a contention of omission.[25] Therefore, 2.309(f)(1)(vi) requires only that the petitioner adequately describe the information it contends should have been included in the COLA.[26] Petitioners amply satisfy such a requirement, describing the following missing information:

> … the FSAR does not address long term storage procedures or realistically consider the size and space limitations of the existing storage facilities. The FSAR also fails to explain how, absent access to an off-site land

[22] SNC Answer at 29; Staff Answer at 42

[23] *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 Contentions)(August 15, 2008) (the "North Anna Order"); *Tennessee Valley Authority*, ASLBP No. 08-864-02-COL-BD01, Memorandum and Order (Ruling on Standing and Contention Admissibility) (September 12, 2008)

[24] SNC Answer at 28; Staff Answer at 48

[25] *North Anna Order* at 21

[26] *North Anna Order* at 21-22, citing *Pa'ina Hawaii, LLC* (Material License Application), LBP 06-12, 63 NRC 403, 413 (2006), pet. for reconsideration denied, CLI-06-25, 64 NRC 128 (2006) (dismissing applicant's appeal as untimely) ("Pa'ina")

> disposal site, SNC can comply with NRC regulations using only its existing facilities for storage.

Petition at 16.

Second, SNC and the NRC staff each allege that SAFETY-1 does not satisfy § 2.309(f)(1)(iv), which requires a petitioner to "demonstrate that the issue raised in the contention is material to the findings the NRC must make."[27] However, 10 C.F.R. §52.79(a)(3) mandates that a COLA address "[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in [P]art 20 …"[28] Accordingly, an "[a]pplicant's plan for managing the radioactive waste that the proposed reactor will generate in compliance with the limits in Part 20 is also material under Part 52 [governing COLs]."[29] In other words, a contention regarding management of LLRW is, by the very terms of the 10 C.F.R. §52.79(a)(3), material to the determination by NRC of whether the COLA is complete.[30]

Third, SNC alleges that SAFETY-1 does not satisfy §2.309(f)(1)(v), which requires a petitioner to "provide a concise statement of the alleged facts or expert opinions" supporting the contention.[31] However, "the pleading requirements of 10

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[27] SNC Answer at 27; Staff Answer at 47

[28] 10 C.F.R. §52.79(a)(3)

[29] *North Anna Order* at 24

[30] In addition, the Staff Answer provides that, in connection with SNC's 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 subject of proposed Contention SAFETY-1if the Application is ultimately granted. The material would be stored in accordance with the requirements of 10 C.F.R. Part 20." (Staff Answer at 44-5, internal quotations omitted). Thus, SNC's plans for storage of waste under Parts 20 and 30 is part of, and material to, NRC's decision of whether to issue a COL.

[31] SNC Answer at 29

C.F.R. §2.309(f)(1)(v), calling for a recitation of facts or expert opinion supporting the issue raised, are inapplicable to a contention of omission beyond identifying the regulatively [sic] required missing information."[32] As noted above, SAFETY-1 is a contention of omission. Accordingly, Petitioners identification of the missing information regarding (i) compliance with NRC LLRW storage and disposal regulations, and (ii) the size and space limitations of existing LLRW storage facilities at the VEGP site,[33] amongst other things, is sufficient.[34]

SNC Must Set Forth a Definitive and Complete Explanation of its Plans to Comply with NRC Regulations Governing Management of LLRW

"NRC has historically discouraged the use of on-site storage as a substitute for permanent disposal."[35] NRC has adopted such a position because shipping LLRW away from the reactor facility "reduces occupational and nonoccupational exposures and potential accident consequences."[36] If waste must be stored on-site, and additional storage capacity is required, then:

> … licensees should conduct substantial safety review and environmental assessments to assure adequate public health and safety projections and

[32] *Pa'ina*, LBP-06-12, 63 NRC at 414.

[33] Interestingly, the SNC Answer states that "Petitioners do not identify any specific size or space limitation [for LLRW storage] and do not provide any facts to suggest that such a limitation exists." (SNC Answer at 31). This is precisely Petitioners' point – Petitioners cannot identify any specific size and space limitations of the LLRW storage facilities based on the COLA, because these limitations are not provided. Even SNC must concede that all storage facilities, whether currently existing at the VEGP site or being considered for future construction in connection with Units 1 and 2, are definitive structures which cannot hold an indefinite amount of LLRW. It is SNC's burden, not Petitioners, to demonstrate that the LLRW created by proposed Units 3 and 4, together with the LLRW created by existing Units 1 and 2, can be adequately stored in such limited storage facilities. (*See generally* NUREG-0800, Appendix 11.4-A).

[34] *See* Petition at 16.

[35] NUREG-1437 at 6.4.3.2. Although NRC has eliminated all language from its guidance prohibiting LLRW storage on-site for more than five years, such an elimination does not negate NRC's ultimate position that on-site storage should not be used as a substitute for permanent disposal.

[36] NUREG-0800, Appendix 11.4-A

> minimal environmental impact … The added storage capacity should typically consider the anticipated low-level waste volumes generated over the operational life of the plant. *Licensee should determine the design storage capacity* (volume and radioactive material inventories) from historical and projected waste generation rates for all units …

NUREG-0800 at Appendix 11.4-A (emphasis added).

Despite this regulation, in both the SNC Answer and the Staff Answer, the parties argue that SNC should not be required to adequately and completely address in its COLA its plans to store LLRW waste on-site (including, without limitation, the storage capacity of any "planned" storage facility) in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations. Remarkably, both assert that a cursory reference in the FSAR that "the *planned* VEGP Units 1 and 2 Low Level Radwaste Storage Facility will be available to provide storage for VEGP Units 3 and 4"[37] satisfies the NRC regulations.[38] However, no such "plan" has been adopted. Rather, as noted by the NRC Staff, design concepts for additional on-site low-level radioactive waste storage are merely being "considered."[39] Petitioners cannot evaluate a "plan" that has not yet been fully developed. Moreover, the NRC regulations do not impose the unreasonable burden on Petitioners to assess the effectiveness and adequacy of all concepts which SNC may simply be considering. Rather, SNC must adopt an actual and definitive plan to store LLRW on-site in its COLA. Without such an adoption, the COLA remains incomplete.

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[37] FSAR at 11.4-2

[38] SNC Answer at 28-9; Staff Answer at 41-2

[39] Staff Answer at 42, citing NUREG-1437, Supplement 34, at 2-14 ("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")(emphasis added). *See also* Vogtle Electric Generating Plant – Units 1&2: Conceptual Design for a Low Level Radwaste Pad at Plant Vogtle (ADAMS Accession No. ML073240581) (stating, as its objective, to "[l]ook at *considerations* for constructing a Concrete Class B/C Radwaste Pad in 2008")(emphasis added).

CONCLUSION

For the reasons stated herein, each of Petitioners' contentions should be admitted for hearing.

Respectfully submitted this 23rd day of December, 2008.

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of	)	
	)	Docket Nos. 52-025 and 52-026
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	)	ASLBP No. 09-873-01-COL-BD01
Vogtle Electric Generating Plant,	)	
Units 3 and 4	)	December 23, 2008
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PETITIONERS' REPLY TO SNC ANSWER OPPOSING PETITION TO INTERVENE AND NRC STAFF ANSWER TO PETITION FOR INTERVENTION** were served upon the following persons by Electronic Information Exchange and/or electronic mail.

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