

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 F. Jackson

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Early Site Permit for Vogtle ESP Site)

Docket No. 52-011-ESP

ASLBP No. 07-850-01-ESP-BD01

February 23, 2009

MEMORANDUM AND ORDER  
(Ruling on In Limine Motions)

Pending before the Licensing Board are February 11, 2009 motions filed by applicant Southern Nuclear Operating Company (SNC) and the NRC staff seeking to strike portions of the prefiled rebuttal testimony and associated exhibits submitted by Joint Intervenors<sup>1</sup> relating to the three contentions -- Environmental Contention (EC) 1.2, [Environmental Report (ER)] Fails to Identify and Consider Cooling System Impacts on Aquatic Resources; EC 1.3, ER Dry Cooling System Alternatives Discussion Fails to Address Aquatic Species Impacts; and EC 6.0, Final Environmental Impact Statement Fails to Provide Adequate Discussion of Impacts Associated with Dredging and Use of the Savannah River Federal Navigation Channel -- that are scheduled to be the subjects of an evidentiary hearing beginning on Monday, March 16, 2009. The Board's rulings on these motions are set forth below, as well as administrative directives regarding further party filings to address these determinations and other matters.

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<sup>1</sup> Joint Intervenors include the Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League.

## I. In Limine Motion Rulings

### A. SNC and Staff Motions to Exclude Portions of Prefiled Rebuttal Testimony of Barry W. Sulkin and Shawn P. Young Regarding Contention EC 1.2

DISCUSSION: [SNC]'s Motion In Limine (Feb. 11, 2009) at 2 [hereinafter SNC Motion In Limine]; NRC Staff Motion In Limine to Exclude Portions of Rebuttal Testimony and Exhibits Filed by Joint Intervenors (Feb. 11, 2009) at 3-4 [hereinafter Staff Motion In Limine]; Joint Intervenors' Response to [SNC]'s and NRC Staff's Motions In Limine to Exclude Portions of Rebuttal Testimony and Exhibits Filed by Joint Intervenors (Feb. 18, 2009) at 4-7 [hereinafter Joint Intervenors Reply].

RULING: SNC and the staff request that the Board exclude portions of the prefiled rebuttal testimony of Barry W. Sulkin referring to cumulative impacts of water withdrawals by users other than SNC's two existing and two proposed Vogtle units as being outside the scope of contention EC 1.2 as admitted. Additionally, SNC requests that the Board exclude question and answer 14 from the prefiled rebuttal testimony of Shawn P. Young as "not 'directed to the initial statements and testimony' as required by 10 C.F.R. § 2.1207(a)(2)." SNC Motion in Limine at 2. Joint Intervenors oppose the in limine motions with regard to Mr. Sulkin's testimony, but do not oppose SNC's in limine motion with regard to Dr. Young's testimony.

As we noted in our ruling on in limine motions concerning Joint Intervenors prefiled direct testimony, arguments regarding the adequacy of the analysis of cumulative impacts from water users other than the existing and proposed Vogtle units are outside the scope of contention EC 1.2 as admitted. See Licensing Board Memorandum and Order (Ruling on In Limine Motions) (Jan. 26, 2009) at 2 (unpublished) [hereinafter Direct Testimony In Limine Ruling]. Joint Intervenors, however, assert that the staff opened the door to rebuttal testimony concerning the cumulative impacts of upstream withdrawals through its discussion of using

Thurmond Dam discharges as a surrogate for flow rates at the Vogtle site and its discussion of earlier impingement and entrainment studies at the Department of Energy's Savannah River Site (SRS).

Joint Intervenors can adequately rebut the staff's testimony regarding the SRS studies without the sentence in answer 9 at issue in SNC's and the staff's in limine motions, as the current withdrawal rates at the D-Area Powerhouse and "other major withdrawals in the Savannah River Basin," do not affect Joint Intervenors argument concerning current aquatic baselines versus aquatic baselines at the time of the SRS studies. Regarding the Thurmond Dam discharge rates, the appropriateness of assuming a flow rate at the Vogtle site equal to the discharge rate from the Thurmond Dam appears to be a separate question from the cumulative impingement and entrainment impacts of water withdrawals between the two locations, and therefore staff direct testimony on the former would not necessarily open the door to rebuttal testimony on the latter. We therefore grant the SNC and staff motions in limine with respect to Mr. Sulkin's contention EC 1.2 rebuttal testimony to the following extent:

1. In answer A9, the first sentence of the last paragraph (beginning "In addition, it is impossible to say anything definitive") is stricken.
2. In answer A11, the second paragraph and the last sentence of the third paragraph (beginning "To determine the cumulative impact") are stricken.<sup>2</sup>
3. Question 14 and its corresponding answer are stricken.

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<sup>2</sup> Although SNC and the staff only requested that the last sentence of this paragraph be stricken, it appears to the Board that, at a minimum, for syntactic purposes the preceding sentence should be removed as well. Indeed, it is arguable that the whole paragraph could be removed in light of the impact of the Board's ruling striking the final sentence and the preceding paragraph. Given that the SNC and staff in limine requests went only to the final sentence of the paragraph, the Board will strike only what was requested. Nonetheless, in providing their revised rebuttal testimony, Joint Intervenors may wish to consider whether the balance of the third paragraph continues to have any probative value so that it should be retained.

Additionally, the unopposed request in the SNC in limine motion regarding Dr. Young's rebuttal testimony is granted, as the discussion of aquatic impacts from dam construction is irrelevant to both contention EC 1.2 as admitted and SNC's and the staff's prefiled direct testimony. Accordingly, with respect to Dr. Young's contention EC 1.2 rebuttal testimony, question 14 and its corresponding answer are stricken.

B. SNC and Staff Motions to Exclude Portions of Prefiled Rebuttal Testimony of William Powers and Exhibits JTI000049, JTI000050, and JTI000051 Regarding Contention EC 1.3

DISCUSSION: SNC Motion In Limine at 3-4; Staff Motion In Limine at 4-9; Joint Intervenors Reply at 7-9.

RULING: SNC and the staff seek to exclude references in Joint Intervenors rebuttal testimony and exhibits to parallel or hybrid wet/dry alternative cooling systems, particularly the system proposed for Dominion's North Anna Unit 3. In our ruling on the SNC and staff in limine motions regarding Joint Intervenors prefiled direct testimony and exhibits, we noted that litigation on the subject of hybrid wet/dry cooling as an alternative cooling system for proposed Vogtle Units 3 and 4 would be outside the scope of contention EC 1.3 as admitted. As Joint Intervenors point out, however, the references to North Anna Unit 3 in Mr. Powers' testimony do not hold out that unit's hybrid cooling system as an alternative; instead, Mr. Powers cites information on North Anna Unit 3 to rebut SNC's argument that dry cooling would be infeasible. While the validity of Joint Intervenors reliance on North Anna Unit 3 data to support their dry cooling arguments is a question the Board may need to explore further through its own questioning of the witnesses, that question goes to the merits and not to whether Mr. Powers' references to North Anna Unit 3 are within the scope of contention EC 1.3. We therefore deny the SNC and staff in limine motions regarding Mr. Powers' testimony and the associated exhibits, with the understanding that those portions of the testimony and the associated exhibits

are being offered, and will be considered, only to support Joint Intervenors arguments concerning the dry cooling alternative.

Nonetheless, Joint Intervenors have agreed that certain portions of the exhibits referenced in Mr. Powers' rebuttal testimony do go beyond the scope of contention EC 1.3 as admitted. Accordingly, we grant the SNC and staff in limine motions regarding exhibits JTI000049 and JTI000050 and strike the following:

1. In exhibit JTI000049,
  - a. Slide 1 on page 2: The title.
  - b. Slide 2 on page 2: The bullet "What is a hybrid cooling system?"
  - c. Slide 2 on page 4: The bullet "Unit 3 cooling system changed in 2005 from open to closed cycle due to agency and public concerns."
  - d. Slide 3 on page 6: Entire slide.
  - e. Page 7: All three slides in their entirety.
  - f. Slide 3 on page 8: Entire slide.
  - g. Slide 1 on page 9: Entire slide.
2. In exhibit JTI000050,<sup>3</sup>
  - a. On page 3-3: First partial sentence on page.
  - b. On page 3-12: The first paragraph under the heading "Heat Dissipation Systems".

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<sup>3</sup> Relative to certain provisions specified on pages 3-9 and 3-10 of Exhibit JTI000050, in its in limine motion the staff indicated that "[t]he Joint Intervernors do not object to this portion of the motion in part. The Joint Intervenors assert that the portions of this section that discuss situations in which Unit 3 is only utilizing the dry portion of its parallel wet-dry cooling system should not be struck." Staff Motion In Limine at 8. Although we do not strike any of the requested portions of these provisions, they remain with the understanding that they are being offered, and will be considered, only to support Joint Intervenors arguments concerning the dry cooling alternative.

C. SNC Motion to Exclude Portions of Prefiled Rebuttal Testimony of Donald F. Hayes Regarding Contention EC 6.0

DISCUSSION: SNC Motion In Limine at 5-6; Joint Intervenors Reply at 10-12.

RULING: SNC seeks to exclude two categories of information from the rebuttal testimony of Dr. Donald Hayes. The first is his opinions provided “outside the area of his expertise,” SNC Motion In Limine at 5, and the second is an opinion concerning potential additional dredging to facilitate dredge spoil disposal. SNC reads portions of answers A12, A13, A14, and A15 of Dr. Hayes’s testimony as opinions on biological impacts outside his area of expertise. We, however, find no indication that Dr. Hayes’s answers include any opinions on biological impacts that are outside his area of expertise. We therefore deny the SNC in limine motion with regard to answers 12-15.

Regarding the discussion of the sediment barge dock and potential additional dredging to accommodate a sediment scow, we find that SNC opened the door to such testimony. As Joint Intervenors point out, at least two of SNC’s witnesses discussed dredge spoil disposal and its environmental impacts in their direct testimony, with Mr. Moorer specifically mentioning loading the material into barges and transporting it to disposal areas or other sites. If SNC offers such testimony, it stands to reason that Joint Intervenors would attempt to rebut it by showing that SNC’s proposed disposal method would have greater environmental impacts than SNC’s witnesses suggest. As with Joint Intervenors dry cooling arguments based on North Anna Unit 3, see section I.B above, the Board may need to explore the merits of this argument further during its questioning of the witnesses. But the argument itself would constitute rebuttal under 10 C.F.R. § 2.1207(a)(2) and is within the scope of contention EC 6.0. We therefore deny the SNC in limine motion with regard to answer 16 of Dr. Hayes’s rebuttal testimony.

## II. Administrative Matters

With the rulings above, certain revisions to and exclusions from Joint Intervenors prefiled rebuttal testimony and exhibits are required.<sup>4</sup> Accordingly, the Board requests that on or before Monday, March 2, 2009, Joint Intervenors submit revised versions of their prefiled rebuttal testimony and any applicable exhibits that omit all of the text that we have stricken by the above rulings.<sup>5</sup> The revised prefiled rebuttal testimony should be designated as “Revised Prefiled Rebuttal Testimony” in the heading. Revised exhibits should be re-designated with a letter R in place of the first zero in the exhibit number or an R2, R3, etc., in place of the first two zeros to reflect the current version of the exhibit.<sup>6</sup> Joint Intervenors should provide Board law clerk Wen Bu (e-mail address: wen.bu@nrc.gov) with a revised electronic copy (preferably in Word format) of their prefiled exhibit list reflecting these changes.

Additionally, the Board wishes to clarify that any revised exhibits that the parties file, whether as a result of the Board’s rulings on in limine motions or otherwise, should be re-named to reflect the most recent revision (e.g., SNCR00001, NRRCR20001, JTIR30001). To that end,

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<sup>4</sup> The parties should be aware that information stricken in accordance with this order remains in the record of this proceeding for the purpose of any subsequent appeal.

<sup>5</sup> A “clean” version of the revised prefiled testimony should be provided, with the questions and answers renumbered in any instance in which a preceding question was deleted. For exhibits, the refiled version should be in “redline,” showing the particular portions of the exhibit that have been stricken.

<sup>6</sup> The parties are reminded that they are responsible for ensuring that documentary materials cited or discussed in their prefiled testimony have the proper evidentiary record support. See Licensing Board Memorandum and Order (Contested Evidentiary Hearing Administrative Matters) (Dec. 15, 2008) at 3 n.4 (unpublished).



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTIONS) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]  
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