

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 52-025-COL and 52-26-COL
Southern Nuclear Operating Company)	ASLBP No. 09-873-01-COL-BD01
(Vogtle Electric Generating Plant, Units 3 & 4))	February 24, 2009

**SOUTHERN NUCLEAR OPERATING COMPANY'S
STATEMENT OF POSITION**

In accordance with the Atomic Safety and Licensing Board's ("Board") Order of February 18, 2009, Southern Nuclear Operating Company ("SNC") submits its Statement of Position regarding the Nuclear Regulatory Commission's ("NRC" or "Commission") February 17, 2009 decision in the *Bellefonte* combined operating license application ("COLA") proceeding.¹ In the *Bellefonte* decision, the Commission reversed the ASLB's admission of a Low-Level radioactive waste ("LLRW") contention that was similar to the Joint Petitioners'² contention in the *Vogtle* COLA proceeding. The *Bellefonte* decision compels dismissal of Joint Petitioners' contention SAFETY-1 in the *Vogtle* COLA proceeding because: (1) as in *Bellefonte*, Joint Petitioners have failed to provide legal and/or factual support for the contention that is required by 10 C.F.R. § 2.309(f)(1); (2) the *Bellefonte* and *Vogtle* COLAs reference the same AP1000 design and are identical with respect to LLRW storage capacity in the Radwaste and

¹ *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 69 NRC __ (slip op. at 5-9) (February 17, 2009).

² Joint Petitioners include the Atlanta Women's Action for New Directions, Blue Ridge Environmental Defense League, Center for a Sustainable Coast, Savannah Riverkeeper, and Southern Alliance for Clean Energy.

Auxiliary buildings; and (3) Vogtle’s COLA provides a site-specific plan for the long-term storage of LLRW in facilities constructed for Units 1 and 2.

1. The Contention does not satisfy the basic requirements of 10 C.F.R. § 2.309(f)(1)

As in *Bellefonte*, the Vogtle Joint Petitioners based their contentions in the COLA proceeding on 10 C.F.R. Part 61 (Licensing Requirements for Land Disposal of Radioactive Waste). Like the ASLB panel in *Bellefonte*, the Commission rejected Part 61 as a valid legal basis for the contention. In its *Bellefonte* Order, the Commission stated that, “Part 61 is inapplicable here because it applies only to land disposal facilities that *receive* waste from others, not to onsite facilities such as Bellefonte’s where the licensee intends to *store* its own low-level radioactive waste.”³ The Commission concluded that absent a valid legal basis for the contention, “the Board was not free to ignore the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).”⁴ Because the Joint Petitioners in the *Vogtle* matter fail to cite any legal basis for their contention other than that expressly rejected by the Commission in *Bellefonte*, and because of the absence of any factual support for the contention beyond that raised in *Bellefonte*, the criteria in 10 C.F.R. 2.309(f)(1) clearly compel the rejection of this contention.⁵

2. The Bellefonte and Vogtle COLAs reference identical designs

In its *Bellefonte* Order, the Commission noted that whether a properly supported LLRW contention is admissible in an individual COLA proceeding is a design and site specific

³ *Bellefonte*, CLI 09-03, slip op. at 5-6.

⁴ *Id.* at 6.

⁵ See SNC Answer Opposing Petition to Intervene, at pp. 3-11 (December 12, 2008) (“SNC Answer”); see also 10 C.F.R. § 2.309(f)(1). Although the Commission noted that the Board could raise bases for the admission of the contention apart from those asserted by the intervenors, and direct the parties to present arguments or evidence relative to those bases, it is clear from the briefing and argument in this proceeding that no legal or factual basis for the requirement of a LLRW storage capacity beyond what the Commission has already approved in the AP1000 DCD exists. Additional briefing would not be productive.

question.⁶ The Vogtle 3 and 4 COLA, like the Bellefonte COLA, references the Westinghouse AP1000 design. The AP1000 Design Control Document (“DCD”) provides for the design of the LLRW handling and storage facilities for both Bellefonte and Vogtle. In *Bellefonte*, the Commission distinguished the LLRW contention from a similar contention admitted in the *North Anna* COLA proceeding, noting that the AP1000 design referenced in the Bellefonte COLA has “designed storage capacity . . . sufficient to store two years’ worth of Class –B and –C radwaste.”⁷ In fact, the AP1000 DCD provides that the AP1000 packaged waste storage room is capable of providing “storage for more than two years at the expected rate of generation and more than a year at the maximum rate of generation.”⁸

The LLRW storage and handling provisions of the AP1000 DCD relied upon in *Bellefonte* are applicable to Plant Vogtle as well.⁹ Given that the minimum storage space required in NRC’s Standard Review Plan is six months, and the NRC’s approval of the design of the AP1000 LLRW storage and handling facilities in the AP1000 design certification rulemaking, the basis for the Commission’s rejection of the contention as it relates to the AP1000 design is clear.¹⁰ Accordingly, the same reasons for rejection of the contention in *Bellefonte* are applicable to the Joint Petitioners’ contention SAFETY-1.

As noted by NRC counsel at the Prehearing Conference in this proceeding, the Vogtle 3 and 4 storage capacity for Class B and C LLRW is expanded if one takes into account that Class

⁶ *Bellefonte*, CLI 09-03, slip op. at 11.

⁷ *See id.* at 7, n. 24.

⁸ *See* AP1000 DCD section 11.4.2.1.

⁹ *See id.*

¹⁰ While the Vogtle FSAR provision providing for the use of the VEGP 1 and 2 storage facility states that the six months of LLRW storage space will be available at VEGP Units 3 and 4, the six month figure is taken from another AP1000 DCD reference that refers to “at least 6 months” worth of storage capacity for packaged wastes. *See* AP1000 DCD at section 11.4.1.3. LLRW can be stored prior to packaging in two spent resin storage tanks in the Auxiliary Building and in the Radwaste Building, effectively giving VEGP 3 and 4 significantly more than six months of storage capacity of LLRW. *See* AP1000 DCD at section 11.4.2.1.

A LLRW can be shipped to a licensed disposal site in Utah.¹¹ Class A waste constitutes 90 to 99 percent of the waste produced, so disposal of Class A LLRW could provide additional storage space for Class B and C LLRW.¹² Accordingly, the Commission's observations regarding the storage space available to *Bellefonte* in the Order dismissing the contention are equally applicable to Plant Vogtle.¹³

3. Site Specific Considerations Compel Dismissal of SAFETY-1

The Commission's admonition that site specific considerations are also relevant to the admissibility of an LLRW contention also compels dismissal of SAFETY-1. As the contention concedes, and the Vogtle Units 3 and 4 COLA clearly states, SNC plans to utilize expanded storage capacity that is available at Vogtle Units 1 and 2 in order to store the radioactive waste from Units 3 and 4.¹⁴ There are also provisions for shipping Class A waste to a disposal facility in Utah once operation of the plant commences.¹⁵

Unlike both the *Bellefonte* and *North Anna* decisions cited in the Commission's *Bellefonte* Order, the Vogtle COLA makes provision for the storage of LLRW at a radioactive waste storage facility located at Vogtle Units 1 and 2 that will contain enough space for the storage of LLRW from Units 3 and 4 in the event that a licensed disposal facility is not available when needed.¹⁶ The Vogtle 1 and 2 storage capacity is being expanded, without a license amendment or other NRC approval, pursuant to 10 C.F.R. § 50.59, which illustrates the validity

¹¹ See Transcript of Vogtle Atomic Safety and Licensing Board Initial Prehearing Conference at 94 (January 28, 2009) ("Tr.").

¹² *Id.* at 93-94.

¹³ By contrast, the North Anna COLA references the ESBWR Design. See *Dominion Virginia Power & Old Dominion Electric Cooperative* (Combined License Application for North Anna Unit 3), LBP-08-15 (slip op. at 5) (August 15, 2008).

¹⁴ Tr. at 87.

¹⁵ *Id.*

¹⁶ *Id.* at 94.

of the Commission's admonition in *Bellefonte* that existing regulations and guidance are adequate to ensure the safe storage of LLRW at plant sites without the need for NRC approval of each expansion of that capacity.¹⁷

4. Applicability of the Summer and Fermi Orders

In accordance with the Board's Order of February 19, 2009, SNC also provides its views on the recent decisions in the *Fermi 3*¹⁸ and *V.C. Summer 2* and *3*¹⁹ proceedings and their impacts on contentions MISC-1 and MISC-2 in the *Vogtle* COLA proceeding.

In *Fermi*, the Commission reiterated and followed its holding in *Shearon Harris*²⁰ in refusing to suspend a COLA proceeding pending the completion of the design certification rulemaking for the standard design referenced in the COLA. The Commission recounted the clear direction provided in its decisions and its Policy Statement on the Conduct of New Reactor Licensing Proceedings²¹ holding that "10 C.F.R. § 52.55(c) explicitly envisions concurrent proceedings on a design certification rule and a COLA. It specifically permits an applicant to reference a design certification that the Commission has docketed but not granted, but provides that in such cases the applicant proceeds 'at its own risk.'"²² Further, the Commission held:

While potential changes to the ESBWR may impact the COLA proceedings, the possibility of significant change in a facility design is inherent in COLA (or any other licensing) proceedings. Indeed, the Commission's rules of practice provide opportunities to file new or amended contentions to address such developments when they arise.²³

¹⁷ *Bellefonte*, CLI 09-03, slip op. at 6.

¹⁸ *Detroit Edison Co.* (Fermi Unit 3), CLI 09-04, 69 NRC __ (slip op. at 6) (February 17, 2009).

¹⁹ *South Carolina Electric & Gas Company* (Summer Nuclear Station, Units 2 and 3), LPB-09-02, 69 NRC __ (slip op. at 6) (February 18, 2009).

²⁰ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC at __, (July 23, 2008).

²¹ Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972-73 (Apr. 17, 2008).

²² *Fermi*, CLI 09-04, slip op. at 6.

²³ *Id.* at 7.

The Commission's Order in *Fermi* provides clear confirmation of the validity under the Commission's regulations and policy of the Vogtle COLA's reference to a "docketed, but not granted," revision to the AP1000 Design Certification Rule. It follows that a contention challenging the COLA because it relies on "uncertified" design information amounts to an impermissible challenge to those same regulations and policy and are inadmissible, as many Commission and Board decisions, including the *Summer* decision discussed below, have held. Further, the Commission Order clearly provides that Petitioners will have the opportunity to submit properly supported contentions if significant changes in the COLA occur as a result of the design certification proceeding relative to the revisions to the AP1000.²⁴

The petitioners' argument in *Summer* was identical to that presented in *Vogtle* contentions MISC-1 and MISC-2, and the *Summer* ASLB held the contention in that matter to be inadmissible.²⁵ SCE&G, the applicant in *Summer*, adopted Rev. 16 of the AP1000 DCD, which is the same design referenced in the *Vogtle* COLA.²⁶ The petitioners in *Summer* alleged that either the COLA is incomplete or that there is a defect in the COLA because "[i]t is impossible to conduct a meaningful technical and safety review of the COLA without knowing the final design of the reactors as they would be constructed by SCE&G," and that, "[o]n its face, the DCD is incomplete. . ."²⁷ Similarly, the *Vogtle* Joint Petitioners state that the COLA omits necessary information and that a meaningful technical and safety review cannot be conducted without the full disclosure of the final and complete reactor design.²⁸

²⁴ *Id.*

²⁵ See *Summer*, LBP-09-02, slip op. at 8.

²⁶ *Id.* at 6; SNC Answer at p. 12.

²⁷ *Summer*, LBP-09-02, slip op. at 6-7.

²⁸ SNC Answer at pp. 11-12 and 22-23.

Like SNC, the applicant in *Summer* provided the Board with detailed references to the COLA and the DCD regarding each item of information that the contention alleged had been omitted. The *Summer* Board noted that “Applicant has provided an exhaustive list in Attachment 2 of its Answer explicitly addressing where in the COLA each asserted omitted matter is, in fact, addressed, and Petitioner has not contradicted a single item on that list in its Reply.”²⁹ Accordingly, the Board held that the contention did not create a genuine issue of material fact as to the allegedly omitted information and was inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi).³⁰ Identical logic applies here.

Given petitioners’ concession that the allegedly omitted information was indeed included in the COLA and their acknowledgement that the true basis of their contention was that the information was “uncertified,” the *Summer* Board recognized that the petitioners’ arguments constituted “an impermissible attack on the design certification process” and were “outside the scope of this proceeding.”³¹ The Board followed the Commission’s direction in *Shearon Harris* that, “[t]he appropriate path for any petitioner’s challenges to proposed design revisions is through participation in those rulemaking proceedings, not through a COL proceeding.”³² The *Summer* Board also noted, however, that to the extent a COLA applicant takes exemptions or departures from a certified design in its COLA proceeding, “an interested party will have the

²⁹ *Summer*, LBP-09-02, slip op. at 10.

³⁰ *Id.*

³¹ *Id.* at 8.

³² *Id.* at 9-10; see also *Shearon Harris*, CLI-08-15, slip op. at 3-4. The *Summer* Board recognized that a contention raised in a COLA proceeding that is otherwise admissible should be referred to the design certification rulemaking and held abeyance in the COLA proceeding, but recognized that contention at issue here is not otherwise admissible. *Summer*, CLI -09-04 at 8-9, n. 37.

opportunity to petition for intervention to raise matters that are material to the decision the NRC must make regarding the licenseability of the proposed Summer nuclear units.”³³

The same regulations, Commission policy, logic and record that supported the *Summer* Board’s dismissal of the contentions in that proceeding compel the dismissal of MISC-1 and MISC-2 in this proceeding. The allegedly omitted information was undisputedly included in the COLA by reference to Revision 16 of the AP1000 DCD, because Part 52 and Commission policy expressly permits a COLA to reference uncertified design information. As in *Summer*, MISC-1 and MISC-2 constitute impermissible challenges to the Commission’s regulations and must be dismissed.

CONCLUSION

The recent decisions of the Commission in *Bellefonte* and *Fermi* compel the dismissal of the contentions SAFETY-1 and MISC -1 and -2, respectively. Similarly, the Commission’s regulations, jurisprudence and policy applied by the ASLB in *Summer* in dismissing MISC -1 and -2 compel the dismissal of those contentions in this proceeding.

Respectfully submitted,

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³³ *Summer*, LBP-09-02 at 12-13.

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Dated this 24th day of February, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S STATEMENT OF POSITION in the above captioned proceeding have been served by electronic mail as shown below, this 24th day of February, 2009, and/or by e-submittal.

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