

**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-COL and 52-026-COL
)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4))	August 6, 2009
)	

**SOUTHERN NUCLEAR OPERATING COMPANY’S ANSWER
OPPOSING MOTION TO ADMIT NEW CONTENTION**

In accordance with 10 C.F.R. §§ 2.309, 2.323, and the Atomic and Safety and Licensing Board’s (“Board” or “ASLB”) Order dated December 2, 2008,¹ Southern Nuclear Operating Company (“SNC” or “Applicant”), hereby answers “Joint Intervenors’ Motion to Admit New Contention” submitted on July 23, 2009 (“Motion”). As explained below, the issues underlying the new contention were resolved by the Board in the Early Site Permit (“ESP”) proceeding and Joint Intervenors (“JIs”) have failed to identify any “significant new information” that would have a material impact on the Board’s decision. Accordingly, the matter is resolved for the purpose of this proceeding under 10 C.F.R. § 52.39(a)(2). JIs also failed to adequately plead and support the contention as required by 10 C.F.R. § 2.309(f)(1), failed to make the required showing under 10 C.F.R. § 2.309(f)(2) for filing new or amended contentions and failed to satisfy the requirements of 10 C.F.R § 2.323(b). For these reasons, JIs’ Motion must be denied in its entirety.²

¹ Memorandum and Order (Initial Prehearing Order), *Southern Nuclear Operating Co.*, Docket Nos. 52-025-COL and 52-026-COL (Dec. 2, 2008), at 6 n.6 (“Initial Prehearing Order”).

² *Id.* SNC does not challenge the standing of the JIs.

I. BACKGROUND

On March 28, 2008, SNC submitted an application to the Nuclear Regulatory Commission (“NRC” or “Commission”) for a combined license (“COL”) for Vogtle Units 3 and 4 (“COLA”).³ The COLA references SNC’s pending application for an ESP. After the contested hearing portion of the ESP proceeding (March 16-19, 2009), the Board issued its First Partial Initial Decision (“PID”) on June 22, 2009, which resolved all matters regarding contentions EC 1.2, EC 1.3, and EC 6.0 in favor of SNC and NRC staff.⁴ The contested portion of the ESP proceeding was then terminated.⁵ The NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene in the *Federal Register* on September 16, 2008.⁶ On November 17, 2008, JIs filed their Petition to Intervene in this COL proceeding. On March 3, 2009, the ASLB admitted contention SAFETY-1.⁷

On July 23, 2009, JIs submitted the Motion seeking to litigate a new contention, NEPA-1. NEPA-1 asserts that channel maintenance of the Savannah River has potentially significant environmental impacts that have not been fully evaluated.⁸ NEPA-1 does not address the specific issues that JIs seek to litigate but states merely that (i) SNC has formally requested that the U.S. Army Corps of Engineers (“USACE”) maintain the navigation channel of the Savannah River,⁹ and (ii) that both United States Senators from Georgia made funding requests to the

³ See Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 24,616 (May 5, 2008).

⁴ PID at 5.3.

⁵ *Id.* The Board is scheduled to rule on the uncontested issues in the ESP proceeding on August 17, 2009.

⁶ See Southern Nuclear Operating Company et al.; Notice of Hearing and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 53,446 (Sept. 16, 2008) (“Hearing Notice”).

⁷ See Memorandum and Order (Ruling on Standing and Contention Admissibility), *Southern Nuclear Operating Co.*, Docket Nos. 52-025-COL and 52-026-COL (March 5, 2009).

⁸ Motion at 2.

⁹ Motion at Exhibit A.

Senate Appropriations Committee to conduct necessary environmental studies and maintenance of the navigation channel.¹⁰

Like NEPA-1 herein, EC 6.0 in the ESP proceeding addressed the potential impacts associated with maintenance of the Savannah River navigation channel.¹¹ In the ESP proceeding, the JIs asserted that NRC staff's analysis of dredging and snagging of the channel was inadequate and failed to comply with NEPA.¹² The Board disagreed and resolved the contention in favor of SNC and NRC staff.¹³

II. ARGUMENT

A. The Subject Matter Of The New Contention Has Been Resolved and JIs Have Not Identified New and Significant Information That Justifies The Admission Of The Contention.

Under the Commission's regulations, "if the application for the . . . combined license references an early site permit, the Commission *shall treat as resolved those matters resolved in the proceeding on the application for . . . the early site permit.*"¹⁴ An issue is "resolved" for the COL proceeding if "the appropriate agency official makes a determination concerning the issue in dispute" in connection with an ESP referenced in the COLA.¹⁵ The only exceptions to this rule are contained in 10 C.F.R. § 52.39(c), which states, in pertinent part, that contentions in a COLA proceeding must relate to a "significant environmental issue that was not resolved in the

¹⁰ *Id.* at 4.

¹¹ PID at 2.12.

¹² *Id.*

¹³ *Id.* at 4.265.

¹⁴ 10 C.F.R. § 52.39(a)(2) (emphasis added). The Commission's purpose in proposing the new Part 52 was to "streamline the licensing process . . . by *permitting early resolution of environmental and safety issues*["] Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,062 (Aug. 23, 1988) (emphasis added).

¹⁵ *See Va. Elec. & Power Co. D/B/A Dominion Va. Power and Old Dominion Elec. Coop.* (North Anna, Unit 3) LBP- 08-15, 68 NRC 294, 306 (August 15, 2008). The Commission has instructed that contentions with respect to COLAs referencing ESP applications that have not been granted are to be treated similarly to COLAs that reference issued ESPs. *See* Conduct of New Reactor Licensing Proceedings, Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (April 17, 2008).

early site permit proceeding, or *any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which significant new information has been identified.*¹⁶ As explained in NRC Regulatory Guide 1.206, a COL applicant may reference an ESP, and the NRC may use the conclusions from the ESP Environmental Impact Statement (“EIS”) in analyzing the COL application.¹⁷ Because the EIS provides the basis for issuing the ESP, the issues that are resolved at the ESP stage are also deemed to be resolved at the COL stage, so long as no “new and significant” material information has become available on the issue.¹⁸ “New information may or may not also be ‘significant.’”¹⁹

Regulatory Guide 1.206 references NRC Regulatory Guide 4.2, which describes an acceptable process for identifying “new and significant” information for a license renewal application, as the process for identifying new and significant information for a COLA.²⁰ Regulatory Guide 4.2 states that “new and significant” information is (i) information that identifies a significant environmental issue *that was not previously considered or documented*, or (ii) any information that *was not considered in the analysis and would lead to an impact finding different from that previously documented.*²¹

Given the analyses and conclusions in the EIS and PID, NEPA-1 must be considered resolved in the COLA proceeding under 10 C.F.R. § 52.39 absent a showing of “new and

¹⁶ 10 C.F.R. § 52.39(c)(v) (emphasis added). Although the Motion does not acknowledge the provisions of 10 C.F.R. § 52.39 at all, it is clear that the Motion does not rest on any other bases for a contention described in § 52.39(c).

¹⁷ Reg. Guide 1.206, Page C.III.3-1.

¹⁸ *Id.*

¹⁹ *Id.* at Page C.111.3-2.

²⁰ *Id.* See Reg. Guide 4.2, Supp. 1, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses, Chapter 5 (September 2000). Reg. Guide 4.2 involves the environmental review process for license renewal, which NRC staff analogized to the “relationship between the environmental review of an ESP application and that of a COL application referencing the ESP.” *Id.*

²¹ Reg. Guide 4.2-S-4.

significant” information regarding the environmental impacts from the possible maintenance of the Savannah River navigation channel. The findings set forth in the PID clearly show that the JIs’ contention regarding the adequacy of NRC staff’s evaluation of the possible dredging and snagging of the channel was resolved in the ESP proceeding. The Board’s findings were based on extensive testimony and documentary evidence regarding the probability that dredging would occur, the administrative process that would have to precede a decision by the USACE to maintain the channel, the probable scope of the project, potential impacts on aquatic species and possible mitigation alternatives.²² The Board found that NRC staff provided a reasonable analysis and explanation for how they reached their determination, that this analysis and explanation is all that is required under NEPA, and resolved the contention, concluding that “the staff’s FEIS finding that cumulative impacts from dredging the federal navigation channel could be MODERATE is adequately supported.”²³

Neither SNC’s letter to USACE nor the Senators’ funding requests constitute “new and significant” information required by 10 C.F.R. § 52.39(c)(v). Clearly, the SNC letter and funding requests do not present a significant environmental issue that was not previously considered or documented because the dredging of the Savannah River channel was extensively addressed and resolved in the ESP proceeding. Moreover, the SNC letter and funding requests are not material to this proceeding because they do not provide any information that is significantly different from that considered by the Board or that would alter the Board’s findings and conclusions in the ESP proceeding. The record in the ESP proceeding includes evidence that SNC intended to evaluate the barging option to deliver components to the Vogtle site, that SNC desired that USACE perform maintenance of the channel under its existing statutory authority,

²² PID at 4.165 - 4.182.

²³ *Id.* at 4.263 - 4.265. “Joint Intervenor contentions EC 1.2, EC 1.3, and EC 6.0 are resolved on the merits in favor of the staff and applicant SNC, and the contested portion of the Vogtle Units 3 and 4 ESP proceeding before this Board is terminated.” *Id.* at 6.1B (emphasis in original).

and that funding would have to be appropriated before the maintenance project could even be evaluated, much less initiated.²⁴ There is nothing new and significant about the facts cited by JIs in the Motion that would lead to an impact finding different than that contained in the PID.

In particular, JIs assert that “SNC’s formal request to the Corps constitutes the triggering event anticipated by the Board” and, as a result, an impact analysis of channel maintenance must be conducted during this COL proceeding.²⁵ In support of this position, JIs cite the following language from the PID:

(3) if SNC determines that dredging will be necessary to transport heavy construction components to the VEGP site and it decides either to request that USACE resume maintenance dredging or to request a permit, *more information likely will be provided and more studies likely will be conducted, and this information likely will be incorporated into any environmental review document produced by USACE*, which would become available and inform a USACE decision on the dredging or the staff’s NEPA decision relating to this SNC ESP application, or the pending SNC COL application for Vogtle Units 3 and 4, depending on the timing of its availability.²⁶

JIs’ interpretation mischaracterizes the Board’s statement. To be sure, the Board noted that JIs “are not necessarily foreclosed” from challenging additional analyses of impacts from dredging, etc., “*if and when a decision is made to dredge the federal navigation channel*”²⁷ and that “Joint Intervenor also may be able to submit a contention challenging any analysis of planned dredging.”²⁸ The Board recognized, however, that the additional “information” and “studies” that may give rise to a new contention “*would become available with USACE’s eventual environmental review*.”²⁹ The Motion does not even suggest that such a review has occurred.

²⁴ PID at 4.183, 4.192 – 4.198.

²⁵ Motion at 3.

²⁶ PID at 5.3.

²⁷ *Id.* at 4.259 (emphasis added).

²⁸ *Id.* at 4.260.

²⁹ *Id.* at 4.264 (emphasis added).

Neither the SNC letter to USACE nor the funding requests constitute a *decision* to dredge the channel nor the additional information or studies contemplated in the PID. In fact, JIs have presented no evidence that such a decision has been made by USACE or that the additional studies and analysis will ever be conducted. Based on these facts, there is simply no new and significant information upon which to base a contention under 10 C.F.R. § 52.39(c)(v).

Attempting to shoehorn this allegedly “new and significant” information into the Board’s statement in the PID, JIs argue that channel maintenance is now “certain” and “imminent,” merely because of SNC’s letter and the *requests* for funding.³⁰ JIs further assert that “this imminence triggers the NEPA requirement” that requires NRC staff to conduct an additional impacts analysis.³¹ Neither of these arguments is valid.

First, the Board’s review of the contention in the ESP proceeding effectively assumed that maintenance of the channel is reasonably foreseeable by focusing on “the sufficiency of the staff FEIS discussion” rather than whether an impacts analysis was required.³² By basing its ruling on the adequacy of the NRC staff’s analysis under NEPA, it makes no difference to the Board’s findings whether dredging is merely foreseeable or a certainty, given the information currently available. Accordingly, the “imminence” or “certainty” of the dredging would not alter any of the Board’s findings and conclusions in the PID and does not require additional NEPA analysis in this proceeding.

Second, the maintenance of the navigation channel is no more certain or imminent now than during the ESP proceeding. As noted in the PID, the evidence was undisputed that USACE must complete numerous steps prior to initiating a project to maintain the channel and, in no

³⁰ Motion at 7.

³¹ *Id.*

³² PID at 4.226.

event, would USACE initiate such a project without adequate funds.³³ Despite the Senators' requests, however, sufficient funding has not been secured for the maintenance of the navigation channel. Neither the House of Representatives nor the Senate versions of the Energy and Water Development and Related Agencies Appropriations Act, 2010 provide the estimated \$5 million funding necessary to perform the channel maintenance project.³⁴ The lack of appropriations make the desired channel maintenance far less probable, and certainly not imminent. Thus, even if the "imminence" or "certainty" of channel maintenance were relevant, the Motion fails to demonstrate that it is more likely to occur than it was when the PID was issued.

The failure of JIs to support their contention with information that would alter the findings and conclusions in the ESP PID regarding the environmental impacts of Savannah River channel maintenance is fatal to their Motion.

B. NEPA -1 Fails to Satisfy Part 2 Requirements for Admission of Contentions.

New or amended contentions may only be filed after the initial filing if, *inter alia*, "[t]he information upon which the amended or new contention is based *is materially different than information previously available;*" and "[t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information."³⁵

A "material" issue is one that would make a difference in the outcome of the proceeding.³⁶ The information relied upon by JIs in the Motion does not satisfy this requirement.

³³ *Id.* at 4.192 – 4.198

³⁴ See ESP Contested Hearing, Transcript at 1316-1317. The version of the bill passed by the Senate added only \$300,000 to the regular appropriation for the Operation and Maintenance of the Savannah River below Augusta at the request of Senator Isakson, compared to the \$6 million (total) that was requested. See S. Rep. No. 111-45, at 183 (2009). The House of Representatives proposed no additional funding for the project. See H. Rep. No. 111-203 (2009). The differences between the House and Senate funding measures will have to be reconciled in a Conference Committee.

³⁵ 10 C.F.R. § 2.309(f)(2)(i-iii) (emphasis added). See *In re Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573 (2006); see also *In re Exelon Generation Co., Inc.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 140 (2005).

³⁶ See Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) quoted by *In re Entergy Nuclear Generation Co. and Entergy*

As explained above, the facts relied upon by the JIs are not materially different from those available to the JIs as early as January 9, 2009, when testimony and exhibits were submitted in the ESP proceeding relative to EC-6. The JIs' Motion does not claim to be based on that evidence and, if it were, the Motion would be untimely under the Board's Prehearing Order.³⁷ Similarly, because the "previously unavailable" information relied upon by JIs is not materially different from information available over seven months ago, the contention fails to satisfy the "good cause" requirement of 10 C.F.R. § 2.309(c).³⁸

Moreover, the new contention must meet each of the standard admissibility requirements of Section 2.309(f)(1).³⁹ JIs' Motion merely presents a list of conclusory statements regarding efforts to secure approval of the channel maintenance with no other substantive information from which the Board could determine the basis for the contention or whether a material issue of fact or law exists.⁴⁰ The Motion neither identifies the ESP findings that JIs claim would be altered by the purported new information nor states how the record in the ESP proceeding does not satisfy NEPA. Accordingly, § 2.323(b) requires the Motion to be denied.

Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 354 (2006) ("With regard to the requirement now stated at § 2.309(f)(1)(iv), that a petitioner must '[d]emonstrate 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,' the Commission has defined a 'material' issue as meaning one in which 'resolution of the dispute would make a difference in the outcome of the licensing proceeding.'"); *see also In re Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163-4 (2005).

³⁷ Alternatively, if the information relied on by the JIs was "materially different," then the JIs' Motion would be untimely because it was filed more than 30 days after the dates of the letters and the funding requests. *See* Initial Prehearing Order, at 6 n.6.

³⁸ *See Entergy Nuclear Vt. Yankee LLC and Entergy Nuclear Operations, Inc.* (Vt Yankee Power Station), LBP-04-032, 62 NRC 813, 821 (2005). Moreover, JIs cursory reference to 10 C.F.R. § 2.309(c) fails to establish the balance of the other criteria in the regulation justifies admission of the contention.

³⁹ *In re Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 161, Docket No. 52-007-ESP (July 28, 2005).

⁴⁰ *See, e.g., Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

C. JIs Failed To Contact The Parties Regarding The Motion.

10 C.F.R § 2.323(b) requires a motion to be rejected unless it includes a “certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the Motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” The Motion does not contain the required certification and JIs failed to notify SNC of its intention to file the Motion or attempt to resolve the issues raised. Accordingly, the Motion is due to be denied.

III. CONCLUSION

For the foregoing reasons, SNC respectfully requests that the Board deny the Motion.

Respectfully submitted,

Signed (electronically) by M. Stanford Blanton

M. Stanford Blanton

Peter D. LeJeune

BALCH & BINGHAM LLP

1710 Sixth Avenue North

Birmingham, AL 35203-2014

Phone: 205-251-8100

E-mail: sblanton@balch.com

Kathryn M. Sutton

MORGAN, LEWIS & BOCKIUS, LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone: 202-739-3000

E-mail: ksutton@morganlewis.com

COUNSEL FOR

SOUTHERN NUCLEAR OPERATING COMPANY

Dated this 6th day of August, 2009.

**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-COL and 52-026-COL
)	
(COL Application for Vogtle Electric)	August 6, 2009
Generating Plant, Units 3 and 4))	

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING MOTION TO ADMIT NEW CONTENTION in the above-captioned proceeding have been served by electronic mail as shown below, this 6th day of August, 2009, and/or by e-submittal.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Moanica M. Caston, Esq.
Southern Nuclear Operating Company, Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B-022
Birmingham, AL 35201-1295
E-mail: mcaston@southernco.com

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Administrative Judge
G. Paul Bollwerk, III, Chair
E-mail: gpb@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D-21
Washington, DC 20555-0001
Patrick A. Moulding, Esq.
Sarah Price, Esq.
Jody C. Martin, Paralegal
E-mail: patrick.moulding@nrc.gov,
sap1@nrc.gov,
jcm@nrc.gov

Administrative Judge
Nicholas G. Trikouros
E-mail: ngt@nrc.gov

Administrative Judge
James F. Jackson
E-mail: jxj2@nrc.gov
jackson538@comcast.net

M. Stanford Blanton, Esq.
C. Grady Moore, III, Esq.
Leslie G. Allen, Esq.
Peter D. LeJeune, Esq.
Kenneth C. Hairston, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2014
E-mail: sblanton@balch.com;
gmoore@balch.com;
lallen@balch.com;
plejeune@balch.com;
kchairston@balch.com

Kathryn M. Sutton, Esq.
Steven P. Frantz, Esq.
Paul M. Bessette, Esq.
Diane A. Eckert, Admin. Assist.
Morgan, Lewis & Bockius, LLP
Co-Counsel for Southern Nuclear Operating
Company, Inc.
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail: ksutton@morganlewis.com
sfrantz@morganlewis.com
pbessette@morganlewis.com
deckert@morganlewis.com

Atlanta Women's Action for New
Directions
(WAND), Blue Ridge Environmental
Defense League (BREDL), Center for
Sustainable Coast (CSC), Savannah
Riverkeeper and Southern Alliance for
Clean Energy (SACE)

Robert B. Haemer, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122
E-mail: robert.haemer@pillsburylaw.com

Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
Lawrence Sanders, Esq.
E-mail: lsande3@emory.edu
Mindy Goldstein
E-mail: magolds@emory.edu

Nuclear Energy Institute
1776 I Street, N.W., Suite 400
Washington, D.C. 20006
Jerry Bonanno, Assistant General Counsel
E-mail: jxb@nei.org

*And upon any other persons designated on the official service list compiled by the Nuclear
Regulatory Commission in this proceeding.

(Original signed by M. Stanford Blanton)

M. Stanford Blanton
Counsel for Southern Nuclear Operating Company

Dated this 6th day of August, 2009.