

August 6, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SOUTHERN NUCLEAR OPERATING CO.) Docket No. 52-025-COL
) 52-026-COL
(Vogtle Electric Generating Plant, Units 3 & 4))

NRC STAFF'S ANSWER TO JOINT INTERVENORS'
MOTION TO ADMIT NEW CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board (Board) Order dated December 2, 2008,¹ the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby responds to the "Joint Intervenors' Motion to Admit New Contention," dated July 23, 2009 ("Motion"). For the reasons set forth below, the Staff opposes the motion, as the proposed new contention does not meet the NRC's requirements for admissibility or timeliness.

BACKGROUND

This proceeding concerns the application filed by Southern Nuclear Operating Company ("Southern" or "Applicant") for a combined license (COL) for Vogtle Electric Generating Plant Units 3 and 4.² On September 16, 2008, the NRC published a notice of hearing on the

¹ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), ML083370608 (Dec. 2, 2008) (unpublished order) (slip op. at 5 n.4, 6 n.6) ("Prehearing Order").

² 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).

Application,³ and a petition to intervene was filed jointly by several organizations on November 17, 2008.⁴ On March 5, 2009, the Board granted the petition and admitted one contention.⁵ The instant Motion proposes a new contention, designated as NEPA-1, raising issues under the National Environmental Policy Act of 1969, as amended (“NEPA”).

As permitted by the regulations in 10 C.F.R. Part 52, Southern’s COL application references Southern’s early site permit (ESP) application for the Vogtle site.⁶ The ESP application remains the subject of a separate licensing proceeding before the NRC, for which an evidentiary hearing on both contested and uncontested matters was held in March 2009. In the contested portion of the ESP proceeding, to which Southern, the Staff, and the Joint Intervenors were all parties, the Board considered the Joint Intervenors’ three admitted environmental contentions. One of the three, designated as Contention EC 6.0, concerned the adequacy of the Staff’s assessment in its Final Environmental Impact Statement (FEIS) of the environmental impacts of potential dredging of the Savannah River Federal navigation channel (FNC) to facilitate barging of heavy components to the Vogtle site.⁷ Following the evidentiary hearing, the Board in the ESP proceeding issued a Partial Initial Decision (LBP-09-07) on June 22, 2009, which resolved the three environmental contentions and terminated the contested portion of the

³ 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).

⁴ See Petition for Intervention (Nov. 17, 2008) (Petition). These organizations are 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 (“Joint Intervenors”).

⁵ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), LBP-09-03, 69 NRC __ (Mar. 5, 2009) (slip op.)

⁶ See COL Application, Part 1, Rev. 1 (May 22, 2009), ML091630236 at 1-16; 10 C.F.R. § 52.26(c).

⁷ See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML082980417 (Oct. 24, 2008) (unpublished order) (slip op. at Appendix A).

proceeding.⁸ The ESP Board's decision with respect to uncontested issues in the ESP proceeding is still pending.⁹ In its ruling on the merits of Contention EC 6.0, the Board found that "the staff's conclusion that the cumulative impacts as a result of dredging the federal navigation channel could be MODERATE is a reasonable, adequately supported, conservative conclusion[.]" *Vogtle ESP*, LBP-09-07, 69 NRC at ___ (slip op. at 139).

As explained below, the Motion mischaracterizes the ESP Board's ruling on the dredging-related contention in the ESP proceeding, and it does not demonstrate that the contention is admissible or timely.

DISCUSSION

I. Legal Standards for Contention Admissibility

The admissibility of new and amended contentions in NRC adjudicatory proceedings is governed by three regulations. These are (a) 10 C.F.R. § 2.309(f)(1), establishing the general admissibility requirements for contentions; (b) 10 C.F.R. § 2.309(f)(2), concerning new and timely contentions; and (c) 10 C.F.R. § 2.309(c), concerning non-timely contentions. See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006). All contentions must comply with the general admissibility requirements in § 2.309(f)(1), requirements which are discussed in more detail in the Staff's initial response to the COL intervention petition, as well as in the Board's ruling on contention admissibility.¹⁰ Failure to comply with any of these requirements is grounds for dismissal of the contention.¹¹

⁸ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-07, 69 NRC ___ (June 22, 2009) (slip op.)

⁹ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML091870345 (July 6, 2009) (unpublished order).

¹⁰ NRC Staff Answer to "Petition for Intervention" at 6-9 (Dec. 12, 2008); LBP-09-03, 69 NRC at ___ (slip op. at 10-14). The requirements in § 2.309(f)(1) state that, to be admissible, a contention must: (continued. . .)

With respect to an application for a combined license that references an early site permit, the applicant's environmental report must contain, *inter alia*, "(ii) Information to resolve any significant environmental issue that was not resolved in the early site permit proceeding; [and] (iii) Any new and significant information for issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding." 10 C.F.R. § 51.50(c)(1). Thus, if an environmental issue was resolved in the ESP proceeding, it is considered to have finality at the COL stage – i.e., it need not be addressed in the applicant's ER or, subsequently, in the Staff's supplement to the ESP EIS (see § 51.92(e)) – unless information concerning that issue has been identified that is both new and significant.¹²

(. . .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 ... 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) . . . [P]rovide 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[.]
- 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹¹ Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

¹² See § 52.39(c)(1) ("In any proceeding for the issuance of a ...combined license referencing an early site permit, contentions on the following matters may be litigated in the same manner as other issues material to the proceeding: ... (v) Any significant environmental issue that was not resolved in the 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.")

II. Legal Standards Governing the Admission of Late-Filed Contentions

The standards governing the admissibility of contentions filed after the initial deadline for filing (*i.e.*, “late-filed contentions”) are well established. First, a late-filed contention may be admitted as a new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave if it meets the following requirements:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id. A contention that does not qualify for admission as a new contention under § 2.309(f)(2) may still be admitted if it meets the provisions governing nontimely contentions, set forth in 10 C.F.R. § 2.309(c)(1).¹³

III. Admissibility and Timeliness of Proposed Contention

The Motion proposes one new contention, NEPA-1. As proposed, NEPA-1 states:

Channel maintenance (including snagging, dredging, and management of dredge spoil material) of the Savannah River Federal Navigation Channel (“the channel”), to support movement of heavy equipment and components for the construction of Units 3 and 4 at the Vogtle Electric Generating Plant has potentially significant environmental impacts that have not been fully evaluated. Due to (1) Southern Nuclear Operating Company’s recent determination that channel maintenance will be necessary, as manifested by its April 14, 2009, letter to the U.S. Army Corps of Engineers (“Corps”) formally requesting the Corps to begin

¹³ 10 C.F.R. § 2.309(c)(1); *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n.7 (2006); *see also Vermont Yankee*, LBP-06-14, 63 NRC at 572-75.

Pursuant to 10 C.F.R. § 2.309(c)(2), each of the factors in § 2.309(c)(1) is required to be addressed in the requestor’s nontimely filing. The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *See, e.g., State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, “petitioner’s demonstration on the other factors must be particularly strong.” *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (*quoting Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

such maintenance, and (2) funding requests for channel maintenance by Senators Chambliss and Isakson, the channel maintenance project is now reasonably foreseeable. Thus, NEPA requires the staff to conduct an impacts analysis on this channel maintenance.

Motion at 2.

Under the regulations in 10 C.F.R. Part 52, environmental matters resolved in an ESP proceeding have finality for purposes of a COL referencing that ESP unless there is new and significant information with respect to those impacts. 10 C.F.R. § 52.39(c)(1)(v). The subject matter of the proposed new contention – analysis of impacts of potential channel dredging – was a matter specifically considered by the Board in the ESP proceeding.¹⁴ For reasons discussed below, the Joint Intervenors have not explained why the allegedly new information cited in the Petition is “significant,” or how it is materially different from the information previously considered in the FEIS. Accordingly, the Motion has not demonstrated that the contention is admissible under § 2.309(f)(1)(iv) and (vi), nor timely under § 2.309(f)(2).

A. The Motion Fails to Demonstrate the Existence of New and Significant Information.

The Motion’s central infirmity is that it fails to even assert that any “new” information is material to the Staff’s *conclusion* in the ESP FEIS regarding the potential impacts of FNC dredging. The contention states that “channel maintenance is now reasonably foreseeable” and that “NEPA requires the staff to conduct an impacts analysis on this channel maintenance.” Yet in LBP-09-07, the Board specifically found that it *did not need to reach* the question of whether dredging of the FNC was reasonably foreseeable, because it determined that the Staff *did*

¹⁴ The Joint Intervenors assert that the ESP FEIS “did not fully consider the impacts of channel maintenance because [the Board] did not find these impacts to be discernable based on available information.” Motion at 2. They later claim that dredging impacts were not resolved in the ESP proceeding because “channel maintenance impacts were explicitly ignored.” *Id.* at 6. As discussed further *infra*, these claims disregard the Board’s determination that the Staff adequately evaluated the environmental impacts of potential dredging and reached a conclusion that was “reasonable, adequately supported, [and] conservative[.]” *Vogtle ESP*, LBP-09-07, 69 NRC at ___ (slip op. at 139).

conduct an adequate analysis of the possible impacts. *Vogle ESP*, LBP-09-07, 69 NRC at ___ (slip op. at 138-39). The Board examined the Staff's conclusion that the impacts from such an action could be MODERATE and found that "the evidentiary record amply support[ed]" the Staff's conclusion. *Id.* at 139. As such, the issue of the adequacy of the Staff's impact analysis regarding potential FNC dredging was resolved in the ESP proceeding and need not be revisited absent new and *significant* information – that is, significant with respect to the basis for the Staff's analysis and conclusion regarding the nature and magnitude of potential impacts.

In alleging new information, the contention references a letter from Southern to the Corps, an internal Corps email, and preliminary project-funding requests by two members of Congress. Motion at 2-4. Importantly, however, the only relevance the Motion ascribes to the "new" information is that it suggests dredging is "now reasonably foreseeable." The Motion fails to explain how any of the purportedly "new" information, even if relevant to the future likelihood of FNC dredging,¹⁵ provides details that are relevant to the *analysis of impacts* of FNC dredging and that were not considered and resolved in the ESP proceeding. In short, based on the ESP Board's decision, whether dredging is "now reasonably foreseeable" is not material to the COL proceeding absent new and significant information about the potential environmental impacts of such dredging.¹⁶ The Motion identifies no new and specific aspects of potential dredging impacts that were not analyzed in the ESP proceeding. Thus, the contention's assertion that

¹⁵ Even assuming it were a consideration relevant to this COL proceeding, the information described in the Motion does not demonstrate that dredging of the FNC is now reasonably foreseeable. The Motion itself acknowledges that "the funding has yet to be appropriated" and that "[t]he Corps stated throughout the ESP proceeding that ... no work could be commenced until the Corps had received the proper federal funding." Motion at 4. Nevertheless, for reasons described herein, the issue of "reasonable foreseeability" of dredging simply does not constitute a material dispute in this proceeding.

¹⁶ In any event, the proposed contention is premature to the extent it is directed to the Staff's COL-stage NEPA analysis, rather than to alleged inadequacies in the applicant's COL ER. The Staff has not yet issued a draft supplement to the EIS, and thus challenges to the Staff's COL-stage NEPA analysis are not ripe.

there are “significant *environmental impacts* [of FNC dredging] that have not been fully evaluated” [Motion at 2, emphasis added] amounts to an unsupported challenge to the conclusion reached by the Staff in the ESP proceeding and upheld by the ESP Board.

Denial of the instant Motion is fully consistent with the ESP Board’s recognition that “if and when a decision is made to dredge” the FNC, the Intervenors “likely will have another opportunity to raise their concerns[.]” *Vogtle ESP*, LBP-09-07, 69 NRC at __ (slip op. at 152). The ESP Board correctly noted that if dredging is indeed pursued, “more information likely will be provided and more studies likely will be conducted”; if so, that information could be new and significant relative to the impacts analyzed in the ESP FEIS. *Id.* at 157. If such information were to arise during the pendency of the COL proceeding, the petitioners could seek to file a new contention addressing these issues. However, given the detailed findings by the ESP Board, new information concerning only the “foreseeability” of dredging reveals no flaw in the environmental analysis already performed; the Motion fails to identify any details or developments that would be material to the Staff’s impact analysis and conclusion of MODERATE. An admissible contention must demonstrate that the issue raised “is material to the findings the NRC must make” and provide supporting reasons for the belief that an application fails to contain relevant information on a matter required by law. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

B. The Motion Fails to Demonstrate That the Contention is Timely.

For the reasons discussed above, the Motion’s failure to identify a material dispute is sufficient grounds to reject the contention. However, the Motion also fails to demonstrate its timeliness. The Board’s initial prehearing order in this proceeding stated that with respect to motions for new or amended contentions, “to be considered timely such motions should be filed within thirty days of the date upon which the information that is the basis of the motion becomes

available to the petitioner/intervenor[.]”¹⁷ The Motion does not specify how any of the documents cited as new information meet that standard; none is dated after May 1, 2009, and the Joint Intervenors do not state when the information became available to them.

The Motion also suggests in vague terms that the contention is timely because it “has been submitted about one month” after the ESP Board’s decision on contested issues. Motion at 6.¹⁸ However, as explained above, the Motion does not explain why the Board’s decision provides a basis for the contention. Lacking a showing of timeliness under the standard established by the Board, the Motion does not demonstrate compliance with the requirements of § 2.309(f)(2)(iii).

Moreover, as discussed above, the Joint Petitioners fail to show that the information they reference is significant. Thus, with respect to the criteria of § 2.309(f)(2), the Motion similarly fails to explain how this information is “materially different” from that considered in the ESP proceeding, much less how it is significant relative to the impacts evaluated in the ESP FEIS and to the Staff conclusion that the ESP Board found to be adequately supported.¹⁹

The Motion asserts in the alternative that it meets the requirements of § 2.309(c) for untimely filings, but the explanation in the Motion constitutes little more than a recitation of the regulatory criteria.²⁰ In particular, the asserted “good cause” for late filing is that the cited

¹⁷ Prehearing Order at 6 n.6.

¹⁸ The Motion cites § 2.309(b)(4)(i) for the proposition that filings are generally timely within “sixty days after the document becomes available.” However, that provision is inapplicable here, and the Board in this proceeding specified the timetable for such motions as thirty days.

¹⁹ Moreover, as explained above, the Motion does not articulate any new and significant information of the sort that the Board’s decision suggested could warrant further environmental analysis at the COL stage.

²⁰ For example, the Motion asserts that “NEPA-1 *will not broaden the issues* or delay the proceeding,” Motion at 7 (emphasis added), but the sole admitted contention concerns the safety analysis of low-level radioactive waste, while the proposed contention concerns environmental impacts of dredging.

documents were “previously unavailable,” but as noted above the Motion does not demonstrate per the Board’s order that the Motion was filed within 30 days of the information’s availability.

CONCLUSION

For the above reasons, the Staff submits that the Motion should be denied, as the proposed new contention does not meet the contention admissibility requirements and fails to meet the late-filed contentions criteria of §§ 2.309(f)(2) and 2.309(c).

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR § 2.304(d)

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' MOTION TO ADMIT NEW CONTENTION" have been served upon the following persons by Electronic Information Exchange this 6th day of August, 2009:

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