

November 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 AMEND CONTENTION SAFETY-1

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 Amend Contention Safety-1," dated October 23, 2009 ("Motion"). For reasons stated below, the Staff opposes the motion.

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 Application,³ and a petition to intervene was filed jointly by several organizations on November

¹ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), ML083370608 (Dec. 2, 2008) (unpublished order) (slip op.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).

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).

17, 2008.⁴ On March 5, 2009, the Board granted the petition and admitted one contention, designated as Safety-1.⁵ After consideration of petitions by the Applicant and Staff for review of the admission of the contention,⁶ the Commission declined to disturb the Board's ruling.⁷ The instant Motion proposes to amend the contention.

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.⁸ Failure to comply with any of these general admissibility requirements is grounds for dismissal of the contention.⁹

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 139 (Mar. 5, 2009).

⁶ See Southern Nuclear Operating Company's Brief In Support of Appeal of LBP-09-03 (Mar. 14, 2009); NRC Staff Brief In Support of Appeal from LBP-09-03 (Mar. 16, 2009) ("Staff Appeal").

⁷ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), CLI-09-16, 70 NRC __ (slip op.) (July 31, 2009).

⁸ NRC Staff Answer to "Petition for Intervention" at 6-9 (Dec. 12, 2008)("Staff Answer"); LBP-09-03, 69 NRC at 152-54. The requirements in § 2.309(f)(1) state that, to be admissible, a contention must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted...;
(continued. . .)

II. Legal Standards Governing the Admission of Amended Contentions

The standards governing the admissibility of contentions filed or amended after the initial deadline for filing (*i.e.*, “late-filed contentions”) are set forth in the Commission’s regulations.

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).¹⁰

(. . .continued)

- (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).

⁹ 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).

¹⁰ 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.

III. Admissibility and Timeliness of Proposed Contention

The Motion proposes to amend contention Safety-1 as follows:

SNC's COLA is incomplete because the FSAR fails to provide adequate detail as to how SNC will comply with NRC regulations governing storage of LLRW in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.

Motion at 2-3. The proposed amended contention would thus substitute the word "adequate" for "any" in the text of the current admitted contention.

A. Compliance with § 2.309(f)(2)

The Motion states that the amended contention is based on the Applicant's response, dated September 23, 2009, to a staff Request for Additional Information ("RAI"). Motion at 2. That RAI sought additional information regarding the Applicant's management of low-level radioactive waste ("LLRW").¹¹ The Joint Intervenors contend that the RAI response is materially different from what was initially in the application regarding storage of LLRW. Motion at 6. The Staff does not challenge the Motion's timeliness and compliance with the Board's Prehearing Order or with §§ 2.309(f)(2) and 2.309(c)(1).

B. Admissibility Under § 2.309(f)(1)

In admitting contention Safety-1, the Board found that the Joint Intervenors had raised a "genuine dispute as to whether information on SNC's extended LLRW storage plan that should have been included has been omitted from the COLA for Vogtle Units 3 and 4." Vogtle, LBP-09-3, 69 NRC at 164. On appeal, the Commission declined to disturb the Board's determination that contention Safety-1 was admissible. Vogtle, CLI-09-16, 70 NRC __ (slip op. at 9).

Both the Board's ruling admitting current Safety-1 and the Commission decision declining to disturb that ruling contemplated that some description of an applicant's contingency

¹¹ See "Response to Request for Additional Information Letter No. 039," ADAMS No. ML092680023 (Sept. 23, 2009) ("RAI Response")

plan for LLRW storage might be necessary in a COL application in the event that offsite storage or disposal was unavailable to the applicant. See *Vogtle*, LBP-09-3, 69 NRC at 161-64; *Vogtle*, CLI-09-16, slip op. at 6. However, neither the Commission nor the Board concluded that NRC regulations require a contingency plan to contain construction-level design information.¹² The Applicant has now submitted additional information concerning its storage plans. As described below, because the instant Motion fails to identify a requirement that more information be provided, denial of the Motion is consistent with the previous Board and Commission rulings.

In their initial petition regarding Safety-1, the Joint Intervenors relied on an assertion that the COL application failed to address long-term storage procedures and to explain how Southern could comply with NRC regulations governing storage. Petition at 16. In finding that the contention presented a genuine dispute, the Board emphasized the Applicant's apparent reliance on information not explicitly referenced in the COL application; the Board also noted that it was not clear that any Southern discussion or analysis had been adopted as an "actual plan for longer-term LLRW storage[.]" See *Vogtle*, LBP-09-3, 69 NRC at 160-64. In its recent RAI response, the Applicant provided additional discussion concerning its plans for onsite or offsite LLRW storage, should the need for such storage arise. RAI Response at 2-7. This plan included two offsite storage contingencies and a description of how storage capacity would be expanded via a long-term onsite storage facility if offsite disposal or offsite storage facilities were not available; it also discussed the design and operational considerations that would be applied to such a facility and cited NRC and industry guidance documents that would be

¹² In CLI-09-16, the Commission emphasized that its decision did not "opine...on the scope of the requirements of 10 C.F.R. § 52.79(a)(3), including any specific time frame for which a COL applicant should address LLRW storage." *Vogtle*, CLI-09-16, slip op. at 8 n.27. Indeed, after describing the regulatory requirements in § 52.79 and 10 CFR Part 20 relied on by the Joint Intervenors, the Commission noted that "[a]s such, the required information is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures. However, the scope and extent of that required information on specific plans or contingency planning is not clear." *Id.* at 6.

followed. *Id.* at 5-7.¹³ Thus, while indicating that extended onsite LLRW storage is not expected to be necessary, *id.* at 2, the Applicant has nevertheless submitted further description of its plant-specific contingency plan.

Now, however, the Joint Intervenors assert in the proposed amended contention that the COL application must contain a more detailed LLRW storage contingency plan than the Applicant has provided. In their Motion, the Joint Intervenors criticize the RAI response as “little more than generalizations and blanket assurances” (Motion at 3) and as “little more than a conceptual framework for initial discussions on onsite storage facility design.” *Id.* at 4. The Motion also states that more information is needed due to “the dangerous nature of LLRW” and states that Southern’s response is “a thinly-veiled attempt to circumvent [10 CFR Parts 20 and 52] by providing unsubstantiated assurances[.]” *Id.* at 5. According to the Joint Intervenors, any LLRW storage plan must specify a precise storage location, design, and construction materials, as well as specific exposure rates and doses. *See id.* at 4-5 & n.18. However, the Motion fails to provide factual or legal support for a contention claiming that even more detail is required. Accordingly, as explained below, the Motion does not satisfy § 2.309(f)(1)(iv), (v), and (vi).

The Motion does not explain why such details are necessary in a COL application to demonstrate compliance with Part 20 or Part 52, and thus why those details are material to the findings the Staff must make. *See* § 2.309(f)(1)(iv). The Joint Intervenors simply allege that the absence of such information makes the application insufficient. The Joint Intervenors cite no regulatory provision, guidance document, or other authority that specifically requires such detailed information in an LLRW storage contingency plan. *See* § 2.309(f)(1)(iv), (v).¹⁴ Nor do

¹³ With respect to the RAI response that is the focus of the Motion, the Staff notes that its response herein concerns only the admissibility of the contention, not the contention’s merits or the Staff’s determination on the adequacy of the application.

¹⁴ The Joint Intervenors state that “Parts 20 and 52 demand sufficient detail in order for the NRC (continued. . .)

the Joint Intervenors provide any facts or expert opinion to support their claim that the plans described in the RAI response are incorrect or insufficient, or that further detail is warranted. See § 2.309(f)(1)(v). The Joint Intervenors do not specifically take issue with any of the design or operational considerations specified in the Applicant's response, the guidance documents to which the Applicant's plan refers, or the feasibility of the Applicant's proposed contingency plan. See § 2.309(f)(1)(vi). The Motion simply concludes that a "lack of detailed analysis cannot be excused." Motion at 5. However, a "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient"; rather, "a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180-81 (1998) (internal citations omitted).

In short, the Joint Intervenors demand a more detailed plan for extended onsite LLRW storage, but they have identified no regulatory provision demonstrating that the Vogtle COL application is required to contain such detail. In particular, where Southern has emphasized that it does not anticipate that it will ultimately employ LLRW storage beyond what is provided in its referenced reactor design,¹⁵ the Joint Intervenors have failed to identify any requirement that the Applicant's plan for such contingency storage contain more information than that now provided in the Applicant's description, or that it must encompass final construction-level design details. See § 2.309(f)(1)(iv), (vi). Moreover, as noted above, the Joint Intervenors do not

(. . .continued)

staff and Joint Intervenors to evaluate whether precautionary measures are as safe as possible." Motion at 5. However, the Joint Intervenors do not explain in what way the standard they articulate ("precautionary measures [that] are as safe as possible") is compelled by Part 20, which refers to procedures and controls that licensees should use to achieve doses that are "as low as reasonably achievable" ("ALARA"). See, e.g., § 20.1101.

¹⁵ See RAI Response at 2.

provide any expert opinion or document that supports their assertion that the plans the Applicant did provide are in any way insufficient. The Motion thus fails to demonstrate that the requested detail is material to the Staff's finding, fails to provide factual or expert support regarding the significance of such information, and fails to specifically contradict the information contained in the Applicant's response. Accordingly, the amended contention does not meet the requirements of § 2.309(f)(1)(iv), (v), and (vi).

CONCLUSION

For the above reasons, the Staff opposes the Joint Intervenors' request to amend Contention Safety-1.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 6th day of November, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' MOTION TO AMEND CONTENTION SAFETY-1" have been served upon the following persons by Electronic Information Exchange this 6th day of November, 2009:

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