

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.

(Vogtle Electric Generating Plant, Units 3 and 4)

Docket Nos. 52-025-COL and 52-026-COL

ASLBP No. 09-873-01-COL-BD01

January 8, 2010

MEMORANDUM AND ORDER  
(Ruling on Motion to Amend Contention)

Currently admitted for litigation in this 10 C.F.R. Part 52 combined license (COL) proceeding in which applicant Southern Nuclear Operating Company (SNC) seeks authorization to construct and operate two new units on the existing Vogtle Electric Generating Plant (VEGP) site is Joint Intervenors<sup>1</sup> contention SAFETY-1, Low-Level Radioactive Waste Storage. Joint Intervenors have now lodged with the Licensing Board a motion to amend this contention based on information provided to the NRC staff by SNC regarding SNC's plans for storage of the

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<sup>1</sup> Joint Intervenors 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.

low-level radioactive waste (LLRW) associated with proposed Units 3 and 4.<sup>2</sup> Both SNC and the staff oppose the amendment request.

For the reasons outlined below, we (1) grant Joint Intervenors amendment request to the degree it frames a legal issue regarding the SNC COL application (COLA) discussion necessary to address the agency's regulations regarding LLRW storage; and (2) provide a schedule going forward for further litigation regarding this legal issue.

## I. BACKGROUND

Joint Intervenors contention SAFETY-1, the sole issue statement currently admitted by this Board in this COL proceeding, provides:

CONTENTION: SNC's COLA is incomplete because the [final safety analysis report (FSAR)] fails to provide any 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.

LBP-09-3, 69 NRC 139, 169 (2009), aff'd, CLI-09-16, 70 NRC \_\_ (July 31, 2009) (emphasis added). In a motion submitted on October 23, 2009, Joint Intervenors have sought to amend this contention to read 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.

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<sup>2</sup> Also pending with the Board is the recently-filed hearing petition of Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor, and James Eddie Partain, whom we refer to as the Joint Petitioning Individuals (JPI), in which the JPI seek to obtain party status in this proceeding and have admitted for litigation a National Environmental Policy Act-related contention regarding impacts associated with the two proposed units on the Savannah River based on what they assert is new information concerning the river's flow rate. We also rule on the admissibility of that petition this date. See LBP-10-1, 71 NRC \_\_ (Jan. 8, 2010).

Joint Intervenors' Motion to Amend Contention SAFETY-1 (Oct. 23, 2009) at 2-3 (emphasis added) [hereinafter Joint Intervenors Amendment Motion]. According to Joint Intervenors pleading, the trigger for this contention amendment request was a September 23, 2009 SNC letter to the staff in response to an August 24, 2009 staff request for additional information (RAI) asking that SNC "submit the details of any proposed onsite storage facility to the NRC . . . [and] provide any arrangements for offsite storage for low-level waste or submit plans for onsite storage." Id. at 2 (quoting Letter from Donald Habib, Project Manager, NRC, to Joseph A. (Buzz) Miller, Executive Vice President, SNC, encl. at 1 (Aug. 24, 2009) (ADAMS Accession No. ML092600698)) (footnote omitted). The SNC response, Joint Intervenors contend, was

insufficient for the following reasons:

- The revisions contain only bare assurances that the design of the storage facility will comply with NRC guidance documents. A design plan is not provided.
- The revisions fail to set forth the site of the storage facility. Instead, SNC states without justification, analysis, or proof that "the storage facility will be sited such that it could be sized to accommodate storage over the life of the plant and designed to accommodate future expansion," "the location of the storage pad would meet dose rate criteria," and "the storage pad location would avoid natural or engineered surface drainage and be located at an elevation with regard to the site's design bases flood level."
- The revisions wholly omit a discussion of the health impacts on SNC employees from the additional LLRW storage.

Id. at 4-5 (quoting Letter from Charles R. Pierce, AP1000 Licensing Manager, SNC, to U.S. NRC Document Control Desk, encl. at 5, 6 (Sept. 23, 2009) (ADAMS Accession No. ML092680023) [hereinafter SNC RAI Response Enclosure]) (footnotes omitted). Moreover, in their motion, Joint Intervenors contend that they fulfill the amendment admissibility requirements of 10 C.F.R. § 2.309(f)(1)-(2), both as to the substance and timeliness of the requested amendment. See id. at 3-6.

In its November 6 response, while not discussing the motion's compliance with section 2.309(f)(2), applicant SNC declares that the contention amendment request fails to satisfy the requirements of section 2.309(f)(1) because it lacks adequate support in the form of factual evidence or expert opinion and does not establish that there is a genuine dispute on a material issue of law or fact. See [SNC] Answer Opposing Motion to Amend Contention (Nov. 6, 2009) at 1 [hereinafter SNC Answer]. In particular, SNC asserts that Joint Intervenors fail to point to any legal authority that requires an FSAR to contain the detail they assert is missing from the information provided by SNC in its September 23 response to the staff's August 24 RAI, including the provisions of (1) 10 C.F.R. § 52.79(a)(3), requiring that a COLA describe the means for limiting radioactive exposures to the limits specified in 10 C.F.R. Part 20; and (2) NUREG-0800, the staff's standard review plan, which guides the staff's approval of an onsite storage facility. See id. at 5-8. Also wanting, SNC claims, is a proffer by Joint Intervenors of any evidence that any of the measures described in the SNC RAI response are inadequate to contain LLRW exposures within 10 C.F.R. Part 20 limits. See id. at 8-10.

For its part, while not challenging the amendment motion's timeliness and compliance with sections 2.309(c)(1) and (f)(2), the staff in its November 6 answer likewise maintains that Joint Intervenors motion should be denied as failing to provide (1) any legal or factual support, including any regulatory provision, guidance document, or other authority, for their claim that more detail is needed regarding its LLRW storage plans than what SNC provided in its RAI response; or (2) any expert opinion or documentation that supports their assertion that the SNC plans are insufficient in any way, either as to the detail or the substance of the information they contain. See NRC Staff's Answer to Joint Intervenors' Motion to Amend Contention SAFETY-1 (Nov. 6, 2009) at 4-8 [hereinafter Staff Answer].

By reply pleading dated November 13, Joint Intervenors contend that both SNC and the staff are improperly disputing the “legal merits” of their contention amendment motion. Joint Intervenors’ Reply to NRC Staff’s Answer to Joint Intervenors’ Motion to Amend Contention SAFETY-1 and [SNC] Answer Opposing Motion to Amend Contention (Nov. 13, 2009) at 2 [hereinafter Joint Intervenors Reply]. Joint Intervenors assert that the motion contained repeated citations to 10 C.F.R. Parts 20 and 52, including section 52.79(a), as support for their claims regarding the inadequacy of the SNC RAI response as well as providing a bulleted list of the information missing from FSAR section 11.4.6.3, as supplemented by the RAI response. See id. at 3-4. They also label as “disingenuous” the SNC argument that the proposed amendment lacks materiality given the previous rulings of this Board and other licensing boards on similar LLRW storage contentions. Id. at 4. As a consequence, Joint Intervenors declare, their amendment motion is adequately supported and should be granted.

## II. ANALYSIS

### A. Legal Standards Governing Contention Amendments

Once the deadline for filing an initial intervention petition has passed, a party wishing to submit amended (or new) contentions on matters not associated with issuance of the staff’s draft or final environmental impact statement (EIS) must satisfy the requirements of 10 C.F.R. § 2.309(f)(2) by showing that:

- (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.

Additionally, the staff suggests that an amended contention that does not meet these provisions nonetheless can be evaluated for admission using the applicable factors governing nontimely submissions as set forth in section 2.309(c). See Staff Answer at 3. Further, as both SNC and the staff assert, see SNC Answer at 5; Staff Answer at 2, an amended contention must meet the contention admissibility standards outlined in section 2.309(f)(1), which we described in detail in our decision ruling on Joint Intervenors initial hearing petition, see LBP-09-3, 69 NRC at 152-54.

B. Admissibility of Joint Intervenors Contention Amendment Request

With respect to the three section 2.309(f)(2) criteria, we have no difficulty in concluding that Joint Intervenors have complied with each of those provisions. Given contention SAFETY-1 was originally admitted as a contention of omission, see LBP-09-3, 69 NRC at 164 & n.20, the LLRW storage-related information provided by SNC in its September 23 response to the staff's August 24 RAI was not previously available and is materially different from what was previously in the SNC SAR relative to LLRW. Further, by submitting their amended contention within thirty days of the SNC response, Joint Intervenors complied with the relevant provisions of the Board's initial prehearing order regarding the time for submitting amended contentions, see Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) at 6 n.6 (unpublished), so as to have submitted their amended contention in a timely fashion,<sup>3</sup> whether

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<sup>3</sup> If, as the staff suggests, section 2.309(c)(1) is applicable to an amended contention only if that amendment is not timely submitted, in the context of this proceeding in which the Board has established thirty days as the presumptive time frame for a timely filing, an important factor in assessing a purported nontimely filing (i.e., one filed after more than thirty days) under section 2.309(c)(1) presumably would be the justification provided for not seeking an extension of time from the Board relative to the thirty-day submission deadline.

for the purpose of section 2.309(f)(2)(iii) or section 2.309(c)(1).<sup>4</sup> The admissibility of this amended contention thus turns on its compliance with the section 2.309(f)(1) criteria.

As Joint Intervenors recognize, under section 2.309(f)(1)(vi), they must establish “that a genuine dispute exists . . . on a material issue of law or fact.” Joint Intervenors Reply at 3 (quoting 10 C.F.R. § 2.309(f)(1)(vi)). Both SNC and the staff assert that a major deficiency in Joint Intervenors proposed contention amendment is that they fail to establish any regulatory basis for the additional information they assert is still lacking. See SNC Answer at 5-8; Staff Answer at 6-8. Joint Intervenors, however, make the point that, per the bulleted list of items set forth in their motion (and quoted above, see supra p. 3), they have demonstrated sufficiently the inadequacy of SNC FSAR section 11.4.6.3 (as it is to be amended by SNC in accordance with the provisions of its RAI response) by reason of that section’s alleged failure to comply with 10 C.F.R. Parts 20 and 52. See Joint Intervenors Reply at 3-4.

Putting aside the question whether, by seeking via their amendment motion to substitute the word “adequate” for the word “any” as the adjective used to describe the “detail” included by SNC in its FSAR discussion of how it will deal with the matter of LLRW disposal, Joint

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<sup>4</sup> Under the “good cause” provision of section 2.309(c)(1)(i), which traditionally has been considered the most important factor among those relevant to any new or amended contention from an already-admitted intervenor, see Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986), the fact that the SNC-provided information was not previously available and that Joint Intervenors, per this Board’s order, provided their amendment motion within thirty days of the information’s availability would establish the requisite good cause so as to place this factor on the side of the balance supporting admission of the amended contention. As to the other potentially relevant section 2.309(c)(1) factors, given Joint Intervenors are the only admitted parties and there is no other means available to protect their interests, both the “represented by existing parties” and “availability of other means” factors, see 10 C.F.R. § 2.309(c)(1)(v), (vi), support its admission. As to the other two factors, the “broaden the issues/delay the proceeding” element, see id. § 2.309(c)(1)(vii), provides little, if any, weight against admission since the matter of LLRW storage is already in this proceeding, which is still at an early stage, while the “assist in developing a sound record” factor, see id. § 2.309(c)(1)(viii), weighs in favor of admission of the contention in that, as a legal issue statement proffered by counsel, see infra pp. 8-9, the lack of expert technical support for the contention is irrelevant.

Intervenors have transformed their admitted contention from one of “omission” to one of “adequacy,”<sup>5</sup> what is apparent is that, as now framed by the parties, this contention raises a rather straightforward legal issue: Whether the agency’s regulatory requirements governing the content of COLAs mandate that the SNC FSAR contain the following information:

1. A design plan for the LLRW storage facility for the two new proposed units based on more than assurances that the facility design will comply with NRC requirements, which must include information regarding building materials and high-integrity containers so as to permit a determination regarding exposure rates and dosages;
2. A specific designation of where on the VEGP site the storage facility will be located; and
3. A discussion of the health impacts on SNC employees from the additional LLRW storage associated with the two new proposed units.

And in that context, we have no difficulty in concluding that Joint Intervenors have proffered an admissible legal contention. Although both SNC and the staff challenge Joint Intervenors contention amendment as lacking any supporting expert opinion or other factual basis under 10 C.F.R. § 2.309(f)(1)(v), see SNC Answer at 9-10, Staff Answer at 6-7, as the Commission recently noted regarding legal contentions, “requiring a petitioner to allege ‘facts’” under section 2.309(f)(1)(v) . . . in support of a legal contention -- as opposed to a factual

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<sup>5</sup> The contention amendment proffered by Joint Intervenors can be contrasted with what a licensing board recently found to be an admissible portion of a new contention challenging an applicant’s LLRW storage-related COLA changes in which the intervenor contested the adequacy of the applicant’s assertion that improved fuel efficiency would reduce the volume of Class B and Class C waste. See Virginia Elec. & Power Co. (Combined License Application for North Anna Unit 3), LBP-09-27, 70 NRC \_\_, \_\_ (slip op. at 26-28) (Nov. 25, 2009). In that instance, the adequacy claim concerned the accuracy of the information provided, as opposed to averring, as is the case here, that additional information was needed to correct an omission.

contention -- is not necessary.” U.S. Dep’t of Energy (High Level Waste Repository), CLI-09-14, 69 NRC \_\_, \_\_ (slip op. at 13) (June 30, 2009) (emphasis in original). Nor in this context do we find their concerns about the materiality of the amended contention under section 2.309(f)(1)(iv) to be sustainable, see SNC Answer at 9; Staff Answer at 6, given the regulatory references (albeit sparse) provided by Joint Intervenors in support of their motion. So too, notwithstanding the staff’s claims to the contrary, see Staff Answer at 7, we find that under section 2.309(f)(1)(vi), as set forth in Appendix A, Joint Intervenors have framed a contention that raises a genuine dispute on a material issue of law. Further, we find this legal contention meets the specificity, basis, and scope requirements of section 2.309(f)(1). See 10 C.F.R. § 2.309(f)(1)(i)-(iii). We thus admit this amended contention, as set forth in Appendix A, as fulfilling the requirements for an admissible issue statement for which further inquiry is appropriate.

### III. PROCEDURES FOR FURTHER LITIGATION

As the Commission also indicated relative to legal contentions, further litigation to resolve the merits of such issues can take several forms. See High Level Waste Repository, CLI-09-14, 69 NRC at 14 & n.65. In this instance, we consider the most appropriate procedural path forward is to establish a schedule for the submission of summary disposition motions.<sup>6</sup> In line with its representations to the staff in its September 23 RAI response, by publicly available submission dated December 11, 2009, SNC provided the promised amendments to its COLA to

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<sup>6</sup> In contrast to the High Level Waste Repository proceeding, which involved a series of complex legal issues the resolution of which, in some instances, were a prerequisite to a merits determination regarding other admitted factual contentions, see CLI-09-14, 69 NRC at \_\_ (slip op. at 10, 14), in this instance involving a single admitted contention, we find dispositive motions, rather than legal briefs, to be the appropriate procedural mechanism for further litigation regarding contention SAFETY-1.

incorporate the information included in its RAI response.<sup>7</sup> See Letter from Charles R. Pierce, SNC AP1000 Licensing Manager, to NRC Document Control Desk (Dec. 11, 2009), encl. (COLA Part 2, Final Safety Analysis Report, at 11.4.1, 11.4.3 to .6 (rev. 2) (ADAMS Accession No. ML093570429)). As a consequence, the legal issue framed by amended contention SAFETY-1 clearly is ripe for further litigation per the schedule that follows:

Motions for Summary Disposition Due:	Friday, January 29, 2010
Responses in Support of Summary Disposition Motions Due:	Monday, February 8, 2010
Responses Opposing Summary Disposition Motions Due: <sup>8</sup>	Monday, March 1, 2010

As 10 C.F.R. § 2.1205(c) indicates, the standards for summary disposition set forth in 10 C.F.R. Part 2, Subpart G, will be applicable to these motions.

#### IV. CONCLUSION

Acting upon an SNC RAI answer that provided information regarding SNC's proposed program for dealing with a situation in which there is no site available for the ultimate disposal of LLRW waste generated by proposed Units 3 and 4 when such disposal might be needed, Joint Intervenors have proffered a proposed amendment to previously-admitted contention

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<sup>7</sup> In its September 23 RAI response, SNC indicated that its FSAR subsection 11.4.6.3 "will be revised" to incorporate new language describing a long-term on-site LLRW storage facility and associated storage pad design and operating considerations. SNC RAI Response Enclosure at 5-7. While this representation was unfulfilled at the time Joint Intervenors submitted their contention amendment, such an SNC COLA amendment commitment to the staff in the context of an ongoing licensing proceeding was sufficiently concrete to afford the basis for an admissible contention challenging this aspect of the SNC COLA for Units 3 and 4.

<sup>8</sup> If no response supporting a summary disposition motion is filed, then any response opposing the motion is due within 20 days from the date of the dispositive motion. We note also that if cross-motions for summary disposition are filed initially (e.g., summary disposition motions are filed by both SNC and Joint Intervenors), then the date for responses in opposition to either motion will be the latest date upon which the opposition to either motion would be due.

SAFETY-1 that questions whether certain additional items purportedly not addressed in the SNC program are nonetheless required to be included in its COLA. Having concluded that consistent with the relevant amended contention admissibility factors in section 2.309(f)(1)-(2), and, to the degree relevant, section 2.309(c)(1), this proposed amendment raises a litigable legal issue regarding the ambit of the agency's regulatory requirements associated with COLAs, we grant Joint Intervenors motion to amend contention SAFETY-1, as set forth in Appendix A below, and establish a schedule for the submission of dispositive motions regarding this legal contention.

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For the foregoing reasons, it is this eighth day of January 2010, ORDERED, that:

1. Joint Intervenors October 23, 2009 motion to amend admitted contention SAFETY-1 is granted in that this contention is revised as set forth in Appendix A to this decision.



## APPENDIX A

### ADMITTED CONTENTION

#### 1. SAFETY-1: LOW LEVEL RADIOACTIVE WASTE STORAGE

CONTENTION: 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 in that it does not contain the following information:

- A. A design plan for the LLRW storage facility for the two new proposed units based on more than assurances that the facility design will comply with NRC requirements, which must include information regarding building materials and high-integrity containers so as to permit a determination regarding exposure rates and dosages;
- B. A specific designation of where on the VEGP site the storage facility will be located; and
- C. A discussion of the health impacts on SNC employees from the additional LLRW storage associated with the two new proposed units.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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SOUTHERN NUCLEAR OPERATING ) Docket No. 52-025-COL  
COMPANY ) and 52-026-COL  
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(Combined Operating License) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON MOTION TO AMEND CONTENTION) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Nancy Greathead]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 8<sup>th</sup> day of January 2010