

February 12, 2010

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
(Combined License Application for Vogtle Site))

NRC STAFF ANSWER IN SUPPORT OF SOUTHERN NUCLEAR OPERATING COMPANY'S
MOTION FOR SUMMARY DISPOSITION OF CONTENTION SAFETY-1

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205(b) and the January 8, 2010, Memorandum and Order (Ruling on Motion to Amend Contention) of the Atomic Safety and Licensing Board ("Board"),¹ the staff of the Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby responds to "Southern Nuclear Operating Company's Motion for Summary Disposition of Contention Safety-1" ("Motion") filed by Southern Nuclear Operating Company ("Southern," "SNC," or "Applicant") on January 29, 2010.² For the reasons set forth below, a genuine dispute of material fact does not exist concerning Contention Safety-1 and, therefore, the Applicant is entitled to a decision in its favor as a matter of law.³ Accordingly, the Board should grant the Applicant's Motion.

¹ Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), Unpublished Order, (Jan. 8, 2010) (ML100082316) ("Order").

² Pursuant to the Board's Order, responses in support of the Applicant's Motion for Summary Judgment were to be filed by February 8, 2010. However, due to inclement weather, the Federal government offices were closed on February 8-11, 2010. Therefore, the Staff is filing this motion, in accordance with 10 C.F.R. § 2.306, on February 12, 2010.

³ Attached to the Applicant's Motion is a Statement of Undisputed Facts in Support of Motion for Summary Disposition of Contention Safety-1. ("Facts"). There is a minor error in Fact 1, in that the Early Site Permit (ESP) for the Vogtle Site was issued on August 23, 2009, rather than August 17, 2009. The NRC Staff does not consider this to be a material fact concerning Contention Safety-1.

BACKGROUND

This proceeding concerns the application filed by Southern Nuclear Operating Company and several co-applicants for a combined license (COL) for Vogtle Electric Generating Plant Units 3 and 4. 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). On September 16, 2008, the NRC published a notice of hearing on the Application. 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). Pursuant to that notice, on November 17, 2008, several organizations filed a joint petition to intervene. See Petition for Intervention (Nov. 17, 2008).⁴ On March 5, 2009, the Board granted the petition and admitted one contention, designated as Safety-1, characterizing that contention as a contention of omission. *Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, LBP-09-03, 69 NRC 139, 160-164 (2009). After consideration of petitions by the Applicant and Staff for review of the admission of the contention,⁵ the Commission declined to disturb the Board's ruling. *Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, CLI-09-16, 70 NRC __ (slip op.) (July 31, 2009).

By letter dated August 24, 2009, the NRC staff issued requests for additional information (RAIs) to Southern concerning the management and storage of low-level waste.⁶ By letter

⁴ 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.

⁵ 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").

⁶ Request for Additional Information Letter No. 039 Related to SRP Section 11.04 for the Vogtle Electric (continued. . .)

dated September 23, 2009, Southern responded to these RAIs by providing additional information regarding long-term storage of low-level radioactive waste (LLRW), information which it subsequently incorporated into its FSAR.⁷

Based on the Applicant's updated information, on October 23, 2009, the Joint Intervenors filed a request to amend their admitted contention. See Joint Intervenors' Motion to Amend Contention Safety-1. On January 8, 2010, the Board ruled on the Joint Intervenors' request, amending the admitted contention 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 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 assurance 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.

Order at Appendix A. In doing so, the Board transformed the admitted contention of "omission" to one of "adequacy" and found that the amended contention raised "a rather straightforward legal issue[.]" *Id.* at 8.

(. . .continued)

Generating Plant, Units 3 and 4 Combined License Application ("RAI Letter 39" including "RAI 11.04-1" and "RAI 11.04-2") (Aug. 24, 2009) (ML092600698).

⁷ See "Response to Request for Additional Information Letter No. 039," (Sept. 23, 2009) (ML092680023) ("RAI Response"); Southern Nuclear Operating Company, Vogtle Electric Generating Plant, Units 3 & 4, COL Application, Final Safety Analysis Report, Revision 2, December 11, 2009. (ML093570429).

Pursuant to the Board's Order, on January 29, 2010, Southern filed a motion seeking summary disposition of Joint Intervenors' Contention Safety-1.

DISCUSSION

I. Legal Standards

A. Summary Disposition

In a Subpart L proceeding, such as this one, the Board must apply the summary disposition standard set forth in Subpart G. See 10 C.F.R. § 2.1205(c). Under this standard, a moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding, together with the statements of the parties and the affidavits, demonstrate that there is no genuine issue as to any material fact. See 10 C.F.R. §§ 2.1205 and 2.710(d)(2); see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio) CLI-93-22, 38 NRC 98, 102-03 (1993). When evaluating summary disposition motions, the Commission has used Rule 56 of the Federal Rules of Civil Procedure as guidance.⁸ See *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 79 (Feb. 2, 2005). As such, the party seeking summary disposition bears the burden of demonstrating the lack of a genuine issue of material fact and the evidence submitted must be construed in favor of the non-moving party. See *Sequoyah Fuels Corp. & General Atomics Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994), *aff'd*, CLI-94-11, 40 NRC 55 (1994). The movant is required to include a statement of

⁸ In pertinent part, this rule states, "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

material facts not at issue and may include affidavits setting forth the facts that would be admissible in evidence. See 10 C.F.R. § 2.710(a)-(b).

B. Regulations Regarding the Content of COLAs and FSARs

The requirements and procedures applicable to Commission issuance of combined licenses are set forth in 10 C.F.R. Part 52, Subpart C. Combined license applications (COLAs) must contain the information specified in 10 C.F.R. § 52.79, including a final safety analysis report (FSAR). Section 52.79(a)(3) requires that a COLA include: “[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter.” See 10 C.F.R. § 52.79(a)(3).

In contrast, Section 52.79(a)(4) requires that a COLA include detailed information regarding the design of the facility, such as the principal design criteria, the design bases and their relationship to the principal design criteria, and information relative to materials of construction, arrangement, and dimensions. See 10 C.F.R. § 52.79(a)(4).

As more fully set forth below, the Staff agrees with the Applicant’s motion with respect to its legal analysis of what NRC regulations require. However, because the Staff review of the Applicant’s compliance with the relevant requirements is not complete, the Staff does not take a position at this time on whether the Application in fact satisfies these requirements. That notwithstanding, summary disposition of Contention Safety-1 as a matter of law is appropriate in accordance with the NRC’s summary disposition standards.

II. Argument

As admitted by the ASLB, the Joint Intervenors’ Contention Safety-1 alleges three deficiencies in Southern’s Combined License Application (COLA): (1) the COL application fails to include an LLRW storage facility design plan including information regarding building materials and high-integrity containers; (2) the COLA fails to specify the proposed location on

the site of the LLRW storage facility; and, (3) the COLA fails to include a discussion of health impacts to employees from storage of additional LLRW associated with the two proposed units. Order at 8. In finding the contention to be admissible, the Board relied upon the Joint Intervenors' references to the regulatory requirements of Section 52.79(a)(3).

A. Applicant's Summary Disposition Motion

In its Motion for Summary Disposition, the Applicant states that Section 52.79(a)(3) does not require an applicant to submit a detailed design for a LLRW storage facility that is not "a component of the facility to be constructed under the COL." Motion at 9. Nor does § 52.79(a)(3) require an applicant to include a discussion of health impacts on employees from any additional LLRW storage that may become necessary. Motion at 18. Rather, § 52.79(a)(3) requires that an applicant, in its FSAR, address the means by which radiation exposures will be kept within the limits of Part 20. By contrast, as noted by the Applicant, if a COLA actually were to propose construction of a facility for long-term onsite storage of LLRW as a component of the facility to be constructed under the COL, the details of the design of such a facility would be a required part of the COLA under § 52.79(a)(4). Motion at 8-9.

The Applicant's analysis regarding the requirements of 10 C.F.R. § 52.79(a)(3) and (4) is correct. 10 C.F.R. § 52.79(a)(3) requires that a COL application include the means for controlling and limiting radioactive effluents and radiation exposures within Part 20 limits. It does not require that an applicant address "health impacts to employees" from LLRW storage beyond the requirements of Part 20 compliance. In admitting the initial contention of omission, the Board acknowledged that "section 52.79(a)(3) does not explicitly speak to long-term storage of LLRW or any specific amount of waste storage." See *Vogtle*, LBP-09-03, 69 NRC at 162. Nevertheless, the Board concluded that the Petitioners had raised a genuine dispute as to whether information regarding extended LLRW storage "that should have been included has been omitted from the COLA for Vogtle Units 3 and 4." *Id.* at 164. The Board stated that the

Applicant had not provided “the level of detail necessary to determine whether SNC’s plan for handling LLRW from proposed Vogtle Units 3 and 4 in the absence of an offsite disposal facility would comply with 10 C.F.R. Part 20 limits.” *Id.* at 162. The Board further reasoned that it did not see how an applicant could address compliance with Part 20 without addressing how it would handle LLRW. *Id.* at 164.

Section 52.79(a)(3), however, does not require a COLA to include detailed design information regarding extended, onsite LLRW storage in the absence of the availability of an offsite disposal facility. Section 52.79(a)(3) simply requires that the final safety analysis report include:

at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license . . . (3) The kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter[.]

10 C.F.R. § 52.79(a)(3). Both the Board’s ruling admitting the initial version of Contention Safety-1 and the Commission decision declining to disturb that ruling contemplated that a COLA might need to include some description of an applicant’s contingency plan for LLRW storage in the event that offsite storage or disposal was unavailable to the applicant. See *Vogtle*, LBP-09-03, 69 NRC at 161-64; *Vogtle*, CLI-09-16, 70 NRC at ____ (slip op. at 6). However, neither the Commission nor the Board concluded that NRC regulations require that a LLRW storage contingency plan contain construction-level design information.⁹

⁹ 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, 70 NRC at ____ (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, (continued. . .)

In short, the Staff agrees with the Applicant that Section 52.79(a)(3) does not require that all COL applications propose an onsite long-term LLRW storage facility. The Staff also agrees that the level of design detail necessary to comply with § 52.79(a)(3) differs from the level of detail necessary for components of the facility that are governed by § 52.79(a)(4).

Consequently, the Staff agrees with the Applicant that where a COL application does not propose construction of an LLRW onsite storage facility as part of the COL facility design, but only as a part of an LLRW management contingency plan that may not become necessary, the application is not required to contain construction-level design information.

In amending the admitted contention, the Board stated that “as now framed by the parties, the contention raises a rather straightforward legal issue: Whether the agency’s regulatory requirements governing the content of COLAs mandate that the FSAR contain” the information that the contention alleges to be inadequate. Order at 8.

As demonstrated above, the Applicant’s COLA and FSAR address the means by which it intends to control and limit radioactive effluents expected to be produced in the operation of proposed new Units 3 and 4 and maintain radiation exposures within the limits set forth in 10 C.F.R. Part 20. Because the COLA does not propose the construction of a facility for storage of LLRW, and § 52.79(a)(3) does not require such a facility, the details regarding the design of any such facility are not a required part of the COL application. Therefore, as a matter of law, the Applicant is entitled to a ruling in its favor as to the legal issue of what information is required by

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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.

§ 52.79(a)(3) and the Board should grant Southern's summary disposition motion with respect to Contention Safety-1.

III. Staff Analysis of Southern's Statement of Material Facts

With its motion, Southern has appended a "Southern Nuclear Operating Company's Statement of Undisputed Facts in Support of Motion for Summary Disposition of Contention Safety-1" ("Fact Statement"), in which Southern identifies sixteen material facts it claims are not in dispute. Southern concludes that, based on these facts, there is no genuine factual dispute remaining that would preclude summary disposition on Contention Safety-1. For the reasons described above, except for the error in the date of issuance of the ESP, the Staff agrees with the material facts as stated by Southern, and the Staff supports the motion for summary disposition.

CONCLUSION

For the reasons discussed above, the NRC Staff submits that the Applicant's motion for summary disposition of Contention Safety-1 should be granted as a matter of law.

Respectfully submitted,

/signed (electronically) by/

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Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated at Rockville, Maryland
this 12th day of February, 2010

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In the Matter of)
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SOUTHERN NUCLEAR OPERATING CO.) Docket No. 52-025-COL
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO SOUTHERN NUCLEAR OPERATING COMPANY'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION SAFETY-1," has been served upon the following persons by Electronic Information Exchange this 12th day of February, 2010:

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