

March 25, 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
(Vogtle Electric Generating Plant, Units 3 and 4))

NRC STAFF ANSWER TO SOUTHERN NUCLEAR OPERATING COMPANY'S
MOTION TO EXCLUDE OR IN THE ALTERNATIVE FOR LEAVE TO REPLY

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board ("Board") Order dated March 16, 2010, the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to "Southern Nuclear Operating Company's Motion to Exclude Portions of Joint Intervenors' Response to Motion for Summary Disposition of Contention Safety-1 Or, in the Alternative, For Leave to Reply" ("Motion") filed by Southern Nuclear Operating Company ("SNC" or "Applicant") on March 15, 2010. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), Unpublished Order (Mar. 16, 2010) (ML100750520) ("Order"). As discussed below, because the factual assertions at issue in the instant Motion are not material to the Board's ruling on the Applicant's summary disposition motion regarding the admitted contention, the Board need not strike those assertions from the record or permit further factual replies. The Board should deny the instant Motion and decline to consider all factual assertions in the Applicant's "Statement of Undisputed Facts," the "Affidavit of Steven Jameson," and the Joint Intervenors' response that are beyond the scope of the admitted contention.

BACKGROUND

This proceeding concerns the application filed by SNC 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). Because the full history of this proceeding has been described in several recent filings by the parties, the Staff here reiterates only some key events.

By letter dated September 23, 2009, SNC responded to Staff requests for additional information (RAI) by providing additional information regarding long-term storage of low-level radioactive waste (LLRW), information which it subsequently incorporated into its Final Safety Analysis Report (FSAR).¹ Based on the Applicant's updated information, on October 23, 2009, the Joint Intervenors filed a request to amend their admitted contention Safety-1. See Joint Intervenors' Motion to Amend Contention Safety-1 ("JTI Motion to Amend"). That request challenged the adequacy of SNC's RAI response with respect to onsite storage facility design. See *id.* at 4-6. 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:

¹ 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).

- 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.

Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), Unpublished Order (Jan. 8, 2010) (ML100082316), at Appendix A. The Board found that the amended contention raised “a rather straightforward *legal issue*” and presented a “genuine dispute on a *material issue of law.*” *Id.* at 8, 9 (emphasis added). The dispute encompassed by the contention as reframed and limited by the Board is whether “the agency’s regulatory requirements governing the content of COLAs mandate that the SNC FSAR contain” the information specified in parts A, B, and C of the amended contention. *Id.* at 8.

Pursuant to the Board’s ruling on the amended contention, on January 29, 2010, SNC filed a motion seeking summary disposition of Joint Intervenors’ Contention Safety-1.² The motion was accompanied by a “Statement of Undisputed Facts”³ (“SNC SOF”) and the “Affidavit of Steven Jameson.” The SNC SOF included various statements relating to the procedural background of this proceeding, the contents of SNC’s FSAR, and SNC’s “On-site Storage Options.” It also included several statements under the heading “Off-site Storage and Disposal Options.” SNC SOF at 4-5. On February 12, 2010, the Staff filed a response in support of

² Southern Nuclear Operating Company’s Motion for Summary Disposition of Contention Safety-1 (Jan. 29, 2010).

³ Southern Nuclear Operating Company’s Statement of Undisputed Facts in Support of Motion for Summary Disposition of Contention Safety-1 (Jan. 29, 2010).

SNC's motion for summary disposition. See NRC Staff Answer In Support of Southern Nuclear Operating Company's Motion for Summary Disposition of Contention Safety-1 (Feb. 12, 2010) ("Staff Answer").

On March 4, 2010, the Joint Intervenors filed a response opposing SNC's motion. See Joint Intervenors' Response to Motion for Summary Disposition of Contention Safety-1 (Mar. 4, 2010). While the body of the response disputed the Applicant's positions on the legal issues stated in the contention, attached to the Joint Intervenors' response was a "Statement of Disputed Facts" ("JTI SOF") and a Joint Declaration.⁴ Both of those documents included a series of factual assertions challenging the statements in the SNC SOF. The JTI SOF indicates that the statements therein are for the purpose of "demonstrating that there are genuine issues of material fact still in dispute." JTI SOF at 1.

DISCUSSION

As explained in the Staff response to SNC's motion for summary disposition, the Staff agrees with the Applicant's legal analysis of what NRC regulations require of a COL application with respect to information regarding onsite LLRW storage. See Staff Answer at 5-9. However, the Staff Answer did not take a position on whether the Application in fact satisfies these requirements. *Id.* at 5. Not only would such a position be premature – because the Staff's review of the application is ongoing – but it would also be beyond the scope of Safety-1, which is limited to the legal question of whether three specific categories of information are required to be in SNC's COL application with respect to onsite LLRW storage. The Staff agreed that summary disposition of Contention Safety-1 as a "contention of law" is appropriate in

⁴ See Joint Declaration of Arjun Makhijani and Diane D'Arrigo in Support of Intervenors' Opposition to Motion for Summary Disposition of Contention Safety-1 (Mar. 4, 2010).

accordance with the NRC's summary disposition standards. See *id.* The alleged factual disputes that prompted the instant motion are immaterial to the amended Safety-1.

With the Board having reframed Safety-1 as a concise legal question, disputes regarding the accuracy of factual statements in SNC's FSAR are not material to the Board's ruling on this legal issue. In particular, as SNC correctly states in its instant Motion, "all three of the listed categories of information which are the subject of Safety-1 deal exclusively with information regarding an *onsite* storage facility." Motion at 10 (emphasis in original). The contention is limited to the legal issue of whether SNC's FSAR is required to contain a design plan for an onsite LLRW storage facility, a specific location on the VEGP site of that facility, and a discussion of its health impacts on SNC employees. Consequently, factual or legal arguments concerning the accuracy of FSAR statements regarding *offsite* LLRW storage availability or storage capacity are outside the scope of the contention and are, therefore, not material to resolving the legal issue it poses. Likewise, none of the three types of information specified in the contention concerns the *technical or policy merits* of particular onsite LLRW storage methods or storage facility designs. Rather, the contention concerns only what design information regarding onsite LLRW storage must be included in a COL application.

Having clearly delineated the scope of Safety-1 in its previous ruling, the Board can exercise its discretion in considering which factual assertions of either the Applicant or the Joint Intervenors, if any, are material to the disposition of the legal contention. See 10 C.F.R. § 2.319(e) (providing the Board with the discretion to "[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments"). Matters outside the scope of the contention include any factual assertions – whether made by SNC or the Joint Intervenors – concerning the availability or capacity of offsite LLRW storage or the technical merits of statements from the FSAR that were directly quoted for the purpose of identifying the current contents of that document. Those assertions include the portion of the SNC SOF labeled "Off-

site Storage and Disposal Options,” the contents of the “Affidavit of Steven Jameson,” and all assertions in the JTI SOF and Joint Declaration (including the spreadsheets accompanying it) that relate to those topics.⁵ The Board therefore should not consider those portions of both the Applicant and Joint Intervenor filings in reaching its ruling on this legal contention. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (factual disputes that are “irrelevant or unnecessary” will not preclude summary judgment); see also *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 99 (1996).

The Staff understood the SNC SOF primarily as an attempt to summarize the history of the contention and to note as background information the portions of the application that were the genesis of the legal issue. However, it appears that SNC’s inclusion of this material has resulted in some confusion. Nevertheless, including background information in an arguably optional factual summary – in particular where the information presented is neither material to the contention nor newly available to the parties – does not redefine the contention. Safety-1 is the only contention before the Board. Because the statements disputed by the Joint Intervenors were not necessary for the resolution of this legal contention in the first instance, the Board need not address those arguments in reaching its determination on the contention.⁶

⁵ It appears to the Staff that the portions of the Joint Intervenors’ filings that are outside the scope of Safety-1 generally correspond to the text shown in redline in Attachment A of Southern’s Motion. However, given the Staff’s view that the statements of undisputed facts are peripheral to the legal dispute that is the narrow focus of the contention, the Staff does not take a position on whether Southern’s proposed exclusions are appropriate on a sentence-by-sentence basis. In any event, for the reasons stated herein, it is not necessary for the Board to remove the contents of any party’s filing from the record.

⁶ For the reasons previously explained, it is not clear to what extent a statement of undisputed facts was necessary for SNC to support its motion for summary disposition of a legal contention. The provision governing summary disposition motions in Subpart L proceedings, 10 C.F.R. § 2.1205, states that such motions must include “a written explanation of the basis of the motion, and affidavits to support statements of fact.” § 2.1205(a). As a practical matter, however, the appropriate scope of such “statements of fact” may be limited in the context of a strictly “legal” contention. Put differently, a presiding officer’s designation of a contention as legal rather than factual already entails an assessment (continued. . .)

In sum, the Board should decline to either exclude information from the record or to permit a factual reply from the Applicant. The Board has already thoroughly considered the legal and factual positions advanced in the parties' previous pleadings and appropriately focused this proceeding on the one, solely legal contention. Accordingly, in reaching a decision on the pending motion for summary disposition, the Board need not consider factual assertions immaterial to this legal issue.

The appropriateness of this approach is reinforced by the recognition that the Joint Intervenors' filings in support of Safety-1 throughout this proceeding have challenged SNC's application only with respect to the level of detail presented regarding onsite storage facility design.⁷ The Joint Intervenors had opportunities to raise factual challenges to the FSAR with respect to offsite storage or the safety of onsite storage as a general matter earlier in this proceeding, but failed to pursue those opportunities. The Joint Intervenors oppose statements in the SNC SOF that were not only previously available to them, but were in the same RAI response on which the Joint Intervenors' motion to amend Safety-1 was based. With respect to these statements, the SNC SOF merely summarized background information that had gone unchallenged by the Joint Intervenors' previous filings. To conclude that SNC's summary thereby "opened the door" to a new dispute of material fact would circumvent the Joint

(. . .continued)

that the relevant disagreement contained in the record is not one of fact; the only admitted "material dispute" is one of law. As a result, the facts required by 10 C.F.R. Part 2 to be included with a motion for disposition of a legal contention – if any – are only those that are material to the admitted legal issue.

⁷ See, e.g., JTI Motion to Amend at 4, 6 ("[Southern's] FSAR revisions provide little more than a conceptual framework for initial discussions on *onsite storage facility design*." ; "A genuine dispute exists as to whether SNC has provided adequate information upon which the NRC staff can base a decision regarding the safety of *LLRW storage at the VEGP site*.") (emphasis added).

Intervenors' obligation to proffer contentions in a timely fashion and put other parties on notice of the matters in controversy.⁸

CONCLUSION

For the reasons discussed above, the Staff submits that the Board should deny the Motion. Further, in making its determination on the pending summary disposition motion, the Board should not consider any assertions in the Applicant's "Statement of Undisputed Facts," the "Affidavit of Steven Jameson," and the Joint Intervenors' response that are beyond the scope of amended Safety-1.

Respectfully submitted,

/signed (electronically) by/

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Executed in Accord with 10 CFR § 2.304(d)

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Dated at Rockville, Maryland
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⁸ Cf. *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004), *recons. den.*, *La. Energy Servs., L.P.*, CLI-04-35, 60 NRC 619 (2004) (The Commission's "contention admissibility and timeliness requirements 'demand a level of discipline and preparedness on the part of petitioners,' who must examine the publicly available material and set forth their claims and the support for their claims at the outset.") (internal citations omitted).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO SOUTHERN NUCLEAR OPERATING COMPANY'S MOTION TO EXCLUDE OR IN THE ALTERNATIVE FOR LEAVE TO REPLY," has been served upon the following persons by Electronic Information Exchange this 25th day of March, 2010:

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