UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**August 23, 2010**

SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER TO PROPOSED NEW CONTENTION BY CERTAIN FORMER JOINT INTERVENORS

In accordance with 10 C.F.R. § 2.323(c), and the Atomic and Safety and Licensing Board's ("Board") Memorandum,[1] Southern Nuclear Operating Company ("SNC") submits this Answer in opposition to the admission of the Proposed New Contention described below.[2] On August 12, 2010, two and a half months after the Board terminated the contested portion of the Vogtle 3 & 4 Combined Operating License Application ("COLA") proceeding,[3] the Blue Ridge Environmental Defense League, Center for a Sustainable Coast, and Georgia Women's Action for New Directions for Clean Energy ("GWA") (collectively, "Movants")[4] submitted the

[1] *See In re Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), Docket Nos. 52-025-COL and 52-026-COL (Aug. 17, 2010) (Memorandum (Referring Request to Admit New Contention to the Commission)) ("Memorandum"). Out of an abundance of caution, SNC is following the Board's suggestion that parties comply with the ten-day response deadlines applicable to motions generally under 10 C.F.R. § 2.323(c). *Id.* at 3 n.5. However, given that Movants have proffered a proposed new contention, SNC notes that, according to 10 C.F.R. § 2.309(h), it appears that SNC and the NRC Staff should have 25 days to file a response to the Proposed New Contention.

[2] Proposed New Contention by Joint Intervenors Regarding the Inadequacy of Applicant's Containment/Coating Inspection Program, Docket Nos. 52-025-COL and 52-026-COL (Aug. 12, 2010 as corrected Aug. 13, 2010).

[3] *In re Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC __, slip. op. at 18 (May 19, 2010).

[4] The Proposed New Contention refers to the entities collectively as "Joint Intervenors." However this group contains only two identical parties out of the five former Joint Intervenors, and one party that appears to be a successor organization to another one of the former Joint Intervenors (the former "Joint Intervenors" included the

Proposed New Contention, alleging purported deficiencies in the containment and containment coating inspection "regime" proposed in the Final Safety Analysis Report ("FSAR") for the Vogtle 3 and 4 COLA. The Movants assert that this late filing is justified because Advisory Committee on Reactor Safeguards ("ACRS") Subcommittee on the Westinghouse AP1000 DCD and Vogtle Units 3 and 4 COL Chairman Ray opined, during an open ACRS Subcommittee meeting on June 25, 2010, that issues relating to inspections of the containment and containment coatings are within the scope of the COL proceedings, not within the scope of the DCD proceedings.[5] This is not new information. Such inspections have been addressed in SNC's FSAR since early 2008. As fully explained below, the Proposed New Contention is untimely, is based on a challenge to the Commission's regulations, asserts matters outside the scope of this proceeding, and fails to meet the other requirements for a motion to reopen the record and nontimely contentions. Accordingly, the newly-proposed contention should be denied in its entirety.

I. Applicable Legal Standards

Since the Board closed the contested proceeding, and the time for Commission review of that order has long expired,[6] Movants are required to meet the standards in § 2.326(a), (b) and (d) to reopen the record. As a threshold matter, § 2.326(a) requires that a motion to reopen the record "will not be granted unless" it (1) is timely or "an exceptionally grave issue;" (2) "address[es] a significant safety or environmental issue;" and (3) "demonstrate[s] that a materially different result would be or would have been likely had the newly proffered evidence

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Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League). *See* Memorandum, at 1 n.1 & n.2.

[5] Proposed New Contention, at 3-4.

[6] *See* Memorandum, at 2 (stating that the Board "lacks jurisdiction to consider the validity of any nontimely/late-filed hearing petitions and/or new/amended contentions").

been considered initially."[7] Under § 2.326(b), the Movants are required to address each of the criteria in § 2.326(a) with affidavits accompanying the motion. Proponents of reopening a closed hearing record bear a "heavy burden" in attempting to meet the "strict and demanding" requirements to reopen the record.[8]

Moreover, because the Movants propose a "contention not previously in controversy between the parties," they must also satisfy the requirements for nontimely contentions set forth in § 2.309(c).[9] The Commission's "rules of practice make it clear that the reopening standards — as well as the late intervention standards — must be met when an entirely new issue is sought to be introduced after the closing of the record."[10] Under § 2.309(c)(1), "good cause" is the most important factor in determining whether a nontimely contention ought to be admitted, and this factor has been consistently interpreted to mean that a proposed new contention be based on information that was not previously available, and was timely submitted in light of that new information.[11] After good cause, seven other factors are balanced in determining whether to admit the contention, including "[t]he extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding."[12]

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[7] 10 C.F.R. § 2.326(a).

[8] *In re Amergen Energy Co.* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 15 (2008).

[9] 10 C.F.R. § 2.326(d).

[10] *In re Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009); *In re Texas Util. Electric Co*. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161 (1993) ("[I]n order to obtain a new hearing when the record has been closed, as in this case, a potential intervenor must satisfy both the late intervention and reopening criteria.") (citation omitted).

[11] *Dominion Nuclear* (Millstone), CLI-09-05, 69 NRC at 125-26 ("[§ 2.309(c)(1)] sets forth eight factors, the most important of which is 'good cause' for the failure to file on time. Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.") (citing *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008); *Texas Util.* (Comanche Peak), CLI-93-4, 37 NRC at 164-65).

[12] 10 C.F.R. § 2.309(c)(1)(vii). The other six factors Movants are required to address in their nontimely filing are: the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; the availability of other means whereby the requestor's/petitioner's interest will be protected; the extent to which the requestor's/petitioner's

Because Movants "must first become a party to a proceeding before seeking to reopen that proceeding" under § 2.326,[13] they must demonstrate that they have standing *as well as* submit an admissible contention.[14] It is not enough for former intervenors to simply rely on a prior finding that they have standing; they have an affirmative duty to show standing, either anew or by a showing that the prior facts upon which the prior standing finding were made are still applicable.[15] Standing requires a description of the entity's interest in the licensing proceeding (for example property, financial, or recreational/use) and how the proceeding might affect it. The entity must show that a favorable ruling in the licensing action would redress its injury.[16] For nuclear facility licensing, proximity within 50 miles of the new facility or "frequent contacts" with the affected area generally establishes standing.[17]

Additionally, any proposed contention must be generally admissible under § 2.309(f)(1), which requires that Movants "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding," raise an issue "in the contention [] material to the findings the NRC must make to support" the issuance of SNC's COLA, and "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[18] "[A] contention that attacks a Commission rule" is not admissible.[19]

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interests will be represented by existing parties; and the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record. Of these remaining factors, "[t]he extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record" is given the most weight. *In re Southern Nuclear* (Vogtle), LBP-10-1, slip op. at 11 (2010) (citing *In re Commonweath Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986)).

[13] *See Texas Util.* (Comanche Peak), CLI-93-4, 37 NRC at 161 n.1.

[14] 10 C.F.R. § 2.309(a). In the event the Movants' Proposed New Contention is treated as a new petition to intervene, rather than as a motion to reopen the record, the requirements of § 2.309(c) and/or (f)(2) nevertheless apply to the petition and are addressed in Sections II.C through II.E of this Answer.

[15] *In re Texas Util.* (Comanche Peak), CLI-93-4, 37 NRC at 163.

[16] *In re Progress Energy Fla., Inc*. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 69-70 (2009) (citing 10 C.F.R. § 2.309(a), (d)).

[17] *Southern Nuclear* (Vogtle), LBP-10-1, slip op. at 5.

[18] Per 10 C.F.R. § 2.309(f)(1) Movants also must "[p]rovide a specific statement of the issue of law or fact to be raised or controverted;" "[p]rovide a brief explanation of the basis for the contention;" and "[p]rovide a concise

II. The Proposed New Contention Should Not be Admitted.

A. The Proposed New Contention Fails to Meet Threshold Requirements for Admissibility.

1. Movants Fail to Address the Standards for Reopening the Record.

Section 2.326(b) requires the Movant to specifically support each § 2.326(a) criterion (timeliness or gravity, significance, and likelihood for a materially different result) with an affidavit accompanying its motion to reopen. "[A] party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim. Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention."[20] Under § 2.326(b), "Each of the [§ 2.326(a)] criteria must be separately addressed, with a specific explanation of why it has been met." Movants have met none of these requirements.[21] The Proposed New Contention should be rejected on the basis of this fundamental deficiency alone, but SNC nevertheless addresses the § 2.326 standards below, as if Movants had done so.

2. Movants Fail to Address Standing.

Movants also fail to demonstrate their standing to reopen this proceeding (in fact, they never even use the term "standing"). Although certain Movants were formerly Joint Intervenors, the Board's termination of the contested proceeding terminated the former Joint Intervenors' party status.[22] Even looking past this procedural deficiency, all the declarations in support of the

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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."

[19] *In re Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC 139, 152 (2009) (Memorandum and Order: Ruling on Standing and Contention Admissibility).

[20] *In re Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

[21] Similarly, § 2.309(c)(2) requires each of the eight (c)(1) balancing factors to be addressed in a nontimely filing, and Movants likewise failed to do so.

[22] *See In re Dominion Nuclear North Anna, LLC* (ESP for North Anna ESP Site), LBP-06-24, 64 NRC 360, 365 (2006).

former Joint Intervenors' standing were signed in 2008,[23] and Movants made no attempt to show that these outdated declarations are still accurate.[24] In addition, for at least the GWA, there have never been any declarations proffered, and there is no evidence that the declarations applicable to the Atlanta Women's Action for New Directions support the standing of the GWA. This complete absence of any standing showing is a threshold failure under §§ 2.326 and 2.309(a) and (d).[25]

3. Movants Fail to Raise a Material Issue Within the Scope of the Proceeding.

The Proposed New Contention asserts a design deficiency which must be raised in the DCD proceeding, and is therefore outside the scope of SNC's COLA proceeding. "[T]he Commission [has] stated that issues concerning a design certification application should be resolved in the design certification rulemaking and not in a COL proceeding."[26] The bulk of the affidavit submitted by the Movants' affiant Mr. Gundersen is concerned with his objections to the AP1000 design. To drive home this point, Movants' Proposed New Contention states that "Mr. Gundersen's declaration and supporting materials show that the COLA does not satisfy the requirements of General Design Criterion 53" which requires that the reactor containment "be

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[23] *See* Intervention Standing Declarations, Docket Nos. 52-025-COL and 52-026-COL (Nov. 17, 2008) *available on ADAMS at* ML083230453.

[24] *See Texas Util.* (Comanche Peak), CLI–93–4, 37 NRC at 161, 163 ("[A] prospective petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate since a petitioner's status can change over time and the bases or its standing in an earlier proceeding may no longer obtain. We would acknowledge that, in certain situations, a petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing.").

[25] Three of the § 2.309(c)(1) balancing factors incorporate the standing requirements. Movants' silence as to standing in their Proposed New Contention is also silence as to three of the total eight balancing factors. *See Southern Nuclear* (Vogtle), LBP-10-1, slip op. at 11.

[26] *In re Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008) ("When a contention is raised in a COL proceeding that challenges information in the design certification rulemaking, licensing boards should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, *if it is otherwise admissible*. If an applicant later decides not to reference a certified design, and instead proceeds with a site-specific design, *any admissible issues*

designed to permit" inspection, surveillance, and testing.[27] By definition, this challenge is to the AP1000 design, which must be raised in the AP1000 DCD proceeding.[28] The Proposed New Contention fails to raise an issue within the scope of SNC's COLA, and therefore does not meet the minimum requirements of § 2.309(f)(1).

Additionally, to the extent the Proposed Contention purports to raise a genuine issue of fact regarding the adequacy of the containment and coatings inspection regime referenced in the FSAR, it is nothing more than an inadmissible challenge to NRC regulations. The Proposed New Contention does not assert, and Mr. Gundersen's affidavit does not suggest, that the inspection regime proposed by SNC in the FSAR fails to satisfy NRC's requirements. Rather the crux of the Proposed New Contention is that the ASME Boiler & Pressure Vessel Code Section XI inspection program is inadequate.[29] It is important to recognize, however, that these ASME Section XI inspection program is mandated under NRC regulations. Under 10 C.F.R. § 50.55a, licensees with COLs are required to comply with 10 C.F.R. § 50.55a(g), which requires that components be inspected consistent with the requirements of ASME Section XI.[30] 10 C.F.R. §

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would have to be addressed in the licensing adjudication.") (emphasis added). As is demonstrated by this Answer, the Proposed New Contention is not otherwise admissible, and should not be admitted.

[27] Proposed New Contention, at 5-6.

[28] *Progress* (Shearon Harris), CLI-08-15, 68 NRC at 4.

[29] Declaration of Arnold Gundersen Supporting Blue Ridge Environmental Defense League's New Contention Regarding AP1000 Containment Integrity on the Vogtle Nuclear Power Plant Units 3 and 4, Docket Nos. 52-025-COL and 52-026-COL (Aug. 12, 2010 as corrected Aug. 13, 2010) ("Gundersen Declaration), at ¶ 27.2 ("[T]he use of ASME inspections to monitor containment integrity is a wholly inadequate methodology.); at ¶ 32 ("To compensate for Vogtle's flaw in containment integrity, the industry and the NRC staff are claiming that protective coatings and the ASME inspection program are mitigating factors that would assure protection of public health and safety in the case of an accident in the single-hulled Vogtle design. However, the data reviewed does not substantiate this industry claim, and instead confirms what the industry knows to be true, that both protective coatings and ASME containment inspection programs have been proven to be wholly inadequate."); at ¶ 34.3 ("Industry experience indicates ASME inspection programs have failed to detect cracks and rust holes."); at ¶ 39 ("Fairewinds' Report (Exhibit 3) and PowerPoint presentation to the ACRS (Exhibit 4) clearly establish that existing ASME XI inspection programs for containments and containment liners on operating reactors have a long history of failing to detect incipient cracks or rust until the metal has been completely breached. Yet in Chapter 6 of the Vogtle COL application, the Applicant relies only upon meeting these criteria that have already failed in the past.").

[30] 10 C.F.R. § 50.55a(g) requires employing the standards incorporated by § 50.55a(b), including "Sections III and XI of the ASME Boiler and Pressure Vessel Code for Operation and Maintenance of Nuclear Power Plants …."

50.55a is applicable to the Vogtle 3 and 4 COLA through 10 C.F.R. §52.79(a)(11), which expressly calls for "[a] description of the program(s) and their implementation, necessary to ensure that systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code and the ASME Code for Operation and Maintenance of Nuclear Power Plants in accordance with 50.55a of this chapter."

Although Mr. Gundersen makes passing reference to ASTM standards, his reference to the Fairewinds Report does not support any criticism of those standards.[31] Neither does his affidavit contain any analysis or provide any specific reason why those standards are inadequate.[32] Moreover, the ASTM standards are specifically identified in NRC Regulatory Guide 1.54 as the basis of the coatings inspection program that are acceptable to the NRC Staff.[33] ASTM D5144-00 is a top-level ASTM standard that incorporates by reference other key ASTM standards, including ASTM D5163-96.[34] Also, a more recent version of ASTM D5144, ASTM D5144-08, also incorporates ASTM D7167 by reference. Except for Mr. Gundersen's unsubstantiated, shoe-horned reference, it is clear that the only inspection standards with which Movants have supported their contention are those in ASME Code Section XI, which are incorporated in NRC regulations.

Accordingly, neither the Proposed New Contention nor Mr. Gundersen's statements assert that SNC's COLA fails to comply with applicable NRC requirements — rather, the claim

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Section 50.55a(g)(4) requires Class MC components to be examined using ASME Section XI. The containment is Class MC as specified in DCD Rev. 16 Table 3.2-3.

[31] *See* Petition to Initiate Special Investigation on Significant AP1000 Design Defect, April 21, 2010 *available on ADAMS at* ML101230513, containing attachment *Post Accident AP1000 Containment Leakage: An Unreviewed Safety Issue* (A Report by Arnold Gundersen), Fairewinds Associates, Inc. (March 26, 2010) ("Fairewinds Report"). In fact, the Fairewinds Report and his presentation at the ACRS meeting are nothing more than cursory red herrings — neither of those documents even mentions the ASTM standards.

[32] *See* Gundersen Declaration, at ¶¶ 40-41.

[33] Office of Nuclear Regulatory Research, Regulatory Guide 1.54, "Service Level I, II, and III Protective Coatings Applied to Nuclear Power Plants" (July 2000), at 1.54-3.

[34] *Id.* at 1.54-4 and 1.54-7.

is that the applicable NRC inspection requirements themselves are inadequate, to-wit: "Although protective coating applications have been failing for more than 10-years, *the NRC continues to approve these coatings* and nuclear power plant licensees continue to claim that these protective coatings are an effective barrier to unmonitored radiation releases."[35] Moreover, Movants' allegation that an individual on the outer boundary of the low population zone would receive a radiation dose in excess of 25 rem TEDE is necessarily premised on the idea that the Section XI inspection program is inadequate, thus leading to the claimed probability of an undetected through-wall containment hole.[36] Simply, this argument is that the NRC's regulations requiring ASME Boiler & Pressure Vessel Code Section XI inspections result in an unacceptable probability of violating 10 C.F.R. § 52.79(a)(1)(vi)(B) and 10 C.F.R. Part 100. Such a contention attacking the adequacy and efficacy of NRC regulations is not admissible:

> [A] contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.* By the same token, a contention that simply states the petitioner's views about what regulatory policy *should* be does not present a litigable issue.[37]

[35] Gundersen Declaration, at ¶ 28.2 (emphasis added).

[36] Movants cite to 10 C.F.R. § 52.157, but that regulation applies to manufacturing licenses, not COLAs. The COLA corollary to this regulation is 10 C.F.R. § 52.79(a)(1)(vi)(B).

[37] *Southern Nuclear* (Vogtle), LBP-09-03, 69 NRC at 152-53 (citing 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)) (emphasis added).

Challenges to NRC regulations are *per se* immaterial, and therefore inadmissible, in an individual licensing proceeding.[38] The proper procedural vehicle for Movants to raise a concern about NRC's regulations is a petition for rulemaking under 10 C.F.R. § 2.802.

B. Movants Fail to Raise an Issue of Sufficient "Gravity" or "Significance" to Justify Reopening the Record.

Section 2.326(a)(1) requires that, if untimely,[39] the matter must raise "'exceptionally grave' exigent circumstances sufficient to warrant the extraordinary step of reopening the record and restarting the hearing process."[40]

What Movants have asserted is, at its core, a long-term maintenance issue that does not pose any immediate threat of harm. Such an issue does not rise to the level of immediate, catastrophic impacts associated with "an exceptionally grave issue,"[41] and Mr. Gundersen's affidavit does not purport to make this showing. In fact, in his affidavit, Mr. Gundersen notes that the industry containment issues that he is concerned with have a "long history" and have occurred over "the last several decades."[42] While he also alleges that "protective coating applications have been failing for more than 10-years," the affidavit acknowledges that "the NRC continues to approve these coatings."[43] Finally, Mr. Gundersen's affidavit acknowledges that the examples of containment vessel cracks cited in the Fairewinds Report "developed over a

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[38] *See id.*

[39] As discussed more fully below, the Proposed New Contention is based on information that has been in the Vogtle COLA since 2008 and is not timely.

[40] *See, e.g., In re Hydro Resources, Inc.*, CLI-00-12, 52 NRC 1, 6 (2000) ("[T]he Commission finds that [the] affidavit does not raise *immediate safety concerns* and is unlikely even in the long term to have safety significance.") (emphasis added).

[41] *See, e.g., In re Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), LBP-02-05, 55 NRC 131, 140 (2002) (finding a contention based on the risk of terrorist attack "exceptionally grave" for purposes of reopening the record).

[42] Gundersen Declaration, at ¶ 17.

[43] *Id.*, at ¶ 28.2.

long period of time."[44] Additionally, challenges to the ASME Section XI rules, which are industry-wide, do not rise to the level of "exigent circumstances." Common industry rules like the ASME Section XI rules are updated and modified over time to keep pace with developing industry knowledge.[45] The analysis relied on in the Proposed New Contention is widely available and, if shown to be appropriate, can influence the ongoing development of future iterations of ASME Section XI rules. Movants have not made any showing that their claimed deficiencies in these standards constitute the sort of extreme circumstances required to reopen the record under § 2.326(a)(1).

Moreover, Movants have not even attempted to address the § 2.326(a)(2) and (a)(3) standards, which not only require that the proposed new contention "address a significant safety… issue" but also that it "demonstrate that a *materially different result* would be or would have been likely had the newly proffered evidence been considered initially."[46] Since the Proposed New Contention challenges issues that either will be resolved in the AP1000 DCD proceeding, or that challenge existing NRC regulations and guidance, the issues raised are not material to the COLA proceeding.

C. The Proposed New Contention is Based on Previously-Available Information, and is Therefore Untimely.

1. The Proposed New Contention is Based on Previously-Available Information.

Movants' only attempt to show timeliness is their characterization of ACRS AP1000 Subcommittee Chairman Ray description of the scope of the ACRS review of the COLA at the June 25, 2010 public ACRS meeting as providing new and not previously available

[44] *Id.*, at ¶¶ 25-26.

[45] *See generally* "Finding Aid," Material Approved for Incorporation by Reference, (Volume 1 - Parts 1 to 50) (Revised as of January 1, 2006) *available at* http://www.nrc.gov/reading-rm/doc-collections/cfr/front/ibr-v1.html (listing the versions of ASME Section XI incorporated by reference in § 50.55a beginning in 1970).

[46] 10 C.F.R. § 2.326(a) (emphasis added).

information.[47] Both the COL and the AP1000 DCD Revision 16, filed well over 2 years ago, included information regarding the containment and coatings inspection programs — clearly indicating that it was within the scope of the COLA proceeding.[48] Subcommittee Chairman Ray's observation of this obvious fact in the June 25 ACRS meeting was not new information, nor did it reflect any sort of change in the NRC's licensing process. To the contrary, the statement merely reiterated a well-established principle of NRC procedure. The statement in no way reflects that Movants have "good cause" under § 2.309(c)(1) for failing to raise their contention during the initial opportunity for hearing, or that their motion is timely under §2.326(a)(1).

Revision 0 of the FSAR (part of the COLA), transmitted to the NRC on March 28, 2008, subsection 6.1.2.1.6, addressed the inspection and monitoring of coatings and provided replacement language for DCD Subsection 6.1.2.1.6.[49] The DCD, as early as Rev. 14, states in Subsection 6.1.2.1.6 that the monitoring of coatings is "controlled by a program prepared by the Combined License applicant (refer to subsection 6.1.3.2)."[50] DCD Section 6.1.3.2 also states that the COL applicant will provide a program to control the monitoring of coatings. The FSAR subsection 6.1.3.2 refers the reader back to FSAR subsection 6.1.2.1.6. Also, FSAR Rev. 0 subsection 6.6 incorporates the latest edition and addenda of the ASME Boiler and Pressure

[47] Proposed New Contention, at 3.

[48] FSAR Rev. 1 § 6.1.2.1.6 (Mar. 28, 2008) stated "The Protective Coatings Program controls the procurement, application, inspection, and monitoring of Service Level I and III coatings."

[49] The text of FSAR Rev. 0, subsection 6.1.2.1.6 Quality Assurance Features, is as follows:

> Replace the third paragraph under the subsection titled "Service Level I and Service Level III Coatings" within DCD Subsection 6.1.2.1.6 with the following information.
>
> The protective coatings program controls the procurement, application, inspection, and monitoring of Service Level I and Service Level III coatings with the quality assurance features discussed above.
>
> The protective coatings program complies with Regulatory Guide 1.54, and is controlled and implemented by administrative procedures.

Vessel Code. No one who read the COLA or the DCD in 2008 could have reasonably misunderstood that the containment and coatings inspection regime is addressed in the COLA, not the DCD. Therefore, Movants should not have been surprised when Subcommittee Chairman Ray reiterated that the coatings inspection program would be taken up as part of the COLA.

Movants' claim that the information is different[51] is clearly refuted by the plain language of the COLA. The description of SNC's coatings inspection programs has remained substantively unchanged and publicly available for over seven months: FSAR Section 6.1.2.1.6 was revised on May 22, 2009 (Revision 1) to specify that the coatings program and its monitoring will be based on the standards of ASTM D5144, ASTM D5163, and ASTM D7167.[52] FSAR Revision 2, which was transmitted to the NRC on December 11, 2009, provides that "coating system inspection and monitoring requirements for the Service level II coatings used in site containment will be performed in accordance with a program based on ASTM D5144…and the guidance of ASTM D5163."[53] Of course, the ASME Boiler & Pressure Vessel Code Section XI, which is purportedly the real focus of Movants' complaint, has been part of NRC's regulations for many years.

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[50] AP1000 DCD Rev. 14. NRC certified the AP1000 in January 2006 in 10 CFR 52, Appendix D, with reference to DCD Rev. 15. *See* 10 CFR 52, Appendix D, Section III.

[51] Proposed New Contention, at 7 ("Research reveals no other source of information indicating that flaws in the design of the AP1000 call for unusually intensive inspections of the containment coatings…The recently published remarks by the ACRS members demonstrated, for the first time, that NRC personnel see the possible need for enhanced inspection regimes, tailored to the site-specific environmental conditions of every plant site.").

[52] FSAR, Revision 1 (May 22, 2009). Revisions 1 and 2 of FSAR, section 6.1.2.1.6 both specify that the coating system monitoring requirements for the containment coating systems are based on ASTM D5163, "Standard Guide for Establishing Procedures to Monitor the Performance of Coating Service Level I Coating Systems in an Operating Nuclear Power Plant," ASTM D7167, "Standard Guide for Establishing Procedures to Monitor the Performance of Safety-Related Coating Service Level III Lining Systems in an Operating Nuclear Power Plant," and ASTM D5144, "Standard Guide for Use of Protective Coating Standards in Nuclear Power Plants."

[53] ND-09-2001, "Southern Nuclear Operating Company Vogtle Electric Generating Plant Units 3 and 4 Combined License Application Submittal No. 5", Docket Nos. 52-025, 52-026, Letter from Charles R. Pierce (Dec. 11, 2009).

Neither does Movants' reference to "recent" industry information on containment integrity in Mr. Gundersen's affidavit and the Fairewinds Report[54] provide good cause for their untimely contention. Mr. Gundersen's conclusions in the Fairewinds Report were submitted publicly to the NRC on April 21, 2010 *by Movants*, among other entities, and the Fairewinds Report itself was dated almost a month earlier, on March 26, 2010.[55] Not only is the Fairewinds Report four months old, but, as demonstrated below, it relies on information available long before that time.

First, the design of the AP1000 and its Passive Containment Cooling System ("PCS") is not new. It dates back several years. The AP1000 design was certified by the NRC in January, 2006.[56] The basic design of the PCS even dates back to the predecessor AP600 design which was certified by the NRC in December, 1999.[57] Additionally, not only is Gundersen's underlying critique of the AP1000 design a topic for the DCD proceeding, not the COLA proceeding, but the Staff addressed the containment shell design in 2003.[58] Interaction between the Staff and Westinghouse regarding containment integrity resulted in changes to the containment design and a commitment that COL applicants would provide a coatings monitoring program, "as described in DCD Tier 2, Section 6.1.3.2, 'Coating Program'" – which indicates that COL applicants will provide monitoring programs.[59] This issue was publicly addressed years ago.

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[54] *See* Petition to Initiate Special Investigation on Significant AP1000 Design Defect, *available on ADAMS at* ML101230513, containing as attachment the Fairewinds Report.

[55] *See* Petition to Initiate Special Investigation on Significant AP1000 Design Defect, April 21, 2010 *available on ADAMS at* ML101230513.

[56] See 10 C.F.R. Part 52, Appendix D, Section V.A.

[57] See 10 C.F.R. Part 52, Appendix C, Section V.A.

[58] Fairewinds Report, at 13-14.

[59] *Id.*

Second, as Mr. Gundersen notes in his Fairewinds Report, the most recent containment problem he reviewed occurred at Beaver Valley in April 2009.[60] In fact, he provided a declaration about the Beaver Valley issue as part of a May 2009 filing with the ACRS.[61] Mr. Gundersen cites the following sources of information related to containment integrity:

- Naus, D.J. and Graves, III, H.L., *Detection of Aging Nuclear Power Plant Structures*, Proceedings of the OECD-NEA Workshop on the Instrumentation and Monitoring of Concrete Structures, NEA/CSNI/ R(2000)15, Organization for Economic Cooperation and Development – Nuclear Energy Agency, ISSY-les-Moulineaux, France, **2001**.
- Beaver Valley – NRC Event Notification Report 45015, **April 23, 2009**.
- Oliver, Anthony and Owen, Ed, New Civil Engineer magazine, **June 18, 2009**.
- USNRC Information Notice 2004-09 (**April 27, 2004**).
- US Patent No. 4,081,323, issued and published **March 28, 1978**.
- ACRS Transcript, **July 8, 2009**.
- Letter, from ACRS to NRC Executive director for Operation R.W. Borchart, **September 21, 2009**.
- Petrangeli, Gianni, *Nuclear Safety*, Butterworth-Heinemann, **2006**.[62]

Mr. Gundersen's analysis based on SNC's COLA and the Fairewinds Report does not cite or rely on any new information, and certainly none of the information Mr. Gundersen centrally relies on is materially different from that which has been available for several months, if not years.

The fact that Movants may have been mistaken about the scope of the design certification rulemaking versus the scope of the COLA does not override the fact that all the relevant information has long been in the public domain, nor does it render the proposed contention timely. "To show good cause, a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner*

[60] *Id.*, at 8. This event became public knowledge by at least April 23, 2009 when the NRC released Event Notification Report 45015. *Id.* at 5.

[61] *Id.*, at 8.

[62] *Id.*, at 3-17.

recently found out about it."[63] Because no statement at the June 25 meeting qualifies as new information, the Proposed New Contention fails to make the central showing of "good cause" under § 2.309(c)(1) or of timeliness under § 2.326(a).

2. The Proposed New Contention was Not Timely Submitted after the ACRS Subcommittee Meeting.

Generally, 30 days is the standard for determining timeliness under § 2.326(a)(1).[64] Even if Subcommittee Chairman Ray's statement could be considered new information, Movants failed to submit the Proposed New Contention within 30 days under § 2.326(a)(1) and § 2.309(c)(1)(i). The Subcommittee Chairman's statement was available on June 25, 48 days — almost seven weeks — before Movants submitted the Proposed New Contention at 11:44 pm E.T. on August 12, 2010. The ACRS Subcommittee meeting was open to the public, even available via teleconference, and was noticed in the *Federal Register* prior to its occurrence.[65] Movants have failed to explain why almost seven weeks passed before they submitted the new contention; they simply cite the date of the meeting transcript, and state that they submitted the new contention within 30 days.[66] This is misleading, at best — especially since they claim that the only reason they had not submitted it in SNC's COLA proceeding earlier was because they "reasonably assumed that matters related to containment corrosion and containment coating degradation would be addressed by the ACRS in its generic review of the AP1000."[67]

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[63] *Dominion* (Millstone), CLI-09-05, 69 NRC at 126 ("[Petitioner] has failed to demonstrate good cause, as the information it relied upon was available earlier, and is not new information merely because [Petitioner] was not aware of it earlier.") (emphasis in original).

[64] *See Amergen* (License Renewal for Oyster Creek), LBP-08-12, 68 NRC at 32-33 & n.2. Generally, in order to be timely under § 2.309(c)(1) and/or § 2.309(f)(2)(iii), Boards have determined that the contention should be submitted within 30 days of the new information. *Id.; see also, e.g., In re Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 231 (2000)).

[65] *See* Transcript, ACRS Subcommittee on the Westinghouse AP1000 DCD and Vogtle 3 and 4 COL (June 25, 2010), at 7:9-13; ACRS; Meeting of the ACRS Subcommittee on AP1000, 35 Fed. Reg. 30,864 (June 2, 2010).

[66] Proposed New Contention, at 3.

[67] *Id.* at 6.

Movants appear to recognize that, generally, in order to be timely, contentions must be submitted within 30 days of the new information,[68] but far more than 30 days elapsed since the Fairewinds Report and SNC's FSAR Rev. 2 (over four months and nearly eight months, respectively), and more than 30 days have elapsed since Subcommittee Chairman Ray's statement.[69] The Proposed New Contention is untimely.

D. The Balancing of Factors Required for a Nontimely Contention Weigh Against Admitting the Proposed New Contention.

Since Movants failed to show "good cause" under § 2.309(c)(1)(i), the remaining balancing factors under § 2.309(c)(1) would have to weigh heavily in favor of the proposed new contention for it to be admitted.[70] They do not. The proposed new contention delves into an entirely new subject matter, heretofore unaddressed in the context of the Vogtle Units 3 and 4 contested proceeding, and so, if permitted, would essentially require that the contested proceeding begin all over again, with new procedural orders, new mandatory disclosures, and the involvement of different experts and personnel. The § 2.309(c)(1)(vii) factor, "the potential for delay if the petition is granted, weighs heavily against [Movants]. Granting [the] request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule."[71]

The balancing factor in § 2.309(c)(1)(viii) requires that the Movants "be expected to assist in developing a sound record" upon which the ultimate decision on SNC's COLA will be based. Mr. Gundersen's Fairewinds Report was already filed at the NRC twice — as part of this filing and in April 2010. The report is based on well-known, published industry information,

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[68] *See id.*, at 3 (noting the ACRS meeting transcript was "released exactly 30 days ago").

[69] *See supra* note 64.

[70] *Southern Nuclear* (Vogtle), LBP-10-1, slip op. at 11 (citing *Commonwealth Edison* (Braidwood), CLI-86-8, 23 NRC at 244).

[71] *See Texas Util.* (Comanche Peak), CLI-93-4, 37 NRC at 167.

that the NRC Staff can consider in its mandatory safety review without further participation by Movants; nothing in the Proposed New Contention indicates how their further participation is necessary to develop a sound record in that it will somehow add to the NRC Staff's safety review of the coatings inspection regime that will occur during the mandatory safety analysis. Mr. Gundersen's affidavit is nothing more than a challenge to the AP1000 design and ASME Boiler & Pressure Vessel Code rules that have been incorporated into NRC regulations. It therefore adds nothing to the record of this proceeding. The balancing of § 2.309(c)(1) factors mandate that the Proposed New Contention not be admitted.

E. If the Proposed New Contention Were Considered as a New Contention, It Would Fail to Meet the Applicable Requirements.

Movants styled their pleading as the submission of a new contention under 10 C.F.R. § 2.309(f)(2). While SNC does not agree that a § 2.309(f)(2) filing is proper at this time, the Proposed New Contention fails to meet the § 2.309(f)(2) standards for the same reasons that it fails to meet the § 2.309(c) standards.[72] Under § 2.309(f)(2), new contentions may be filed after the initial filing deadline only upon a showing that (i) the new contention is based on information not previously available, (ii) the new information is "materially different" than previously available information,[73] and (iii) the new contention was "submitted in a timely fashion based on the availability of the subsequent information."

As shown in Section II.C.1, the Proposed New Contention is based on information long available to the public, and Subcommittee Chairman Ray's statement that Movants assert is the requisite new information was a restatement of existing NRC practice. Similarly, Section II.C.1 explains that the information upon which the Proposed New Contention is based has been in

[72] Similarly, a new contention under §2.309(f)(2) would be required to satisfy the standards of §2.309(f)(1). As demonstrated in Section II.A.3 of this Answer, Movants have failed to satisfy those requirements.

SNC's COLA (at the latest) for seven months, and much of it even earlier. The information that Mr. Gundersen cites is likewise based on industry data that has been available for many months, if not years. Finally, as explained above in Section II.C.2, even were Subcommittee Chairman Ray's statement considered to be new information, Movants did not timely submit the Proposed New Contention after the statement was made. The Proposed New Contention fails to meet all the § 2.309(f)(2) standards.

III. Conclusion

Movants failed to make the threshold showing of standing. Additionally, the Proposed New Contention fails to meet the requirements in § 2.326(a), (b), and (d), including the requirements in § 2.309(c)(1) incorporated therein, and so should be dismissed insofar as the Proposed New Contention is considered a motion to reopen the record. The Proposed New Contention also fails to meet the requirements in § 2.309(f)(2), and so should be dismissed insofar as it is considered a new contention.

Respectfully submitted,

Signed (electronically) by M. Stanford Blanton

M. Stanford Blanton
Peter D. LeJeune
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2014
Phone: 205-251-8100
E-mail: sblanton@balch.com

Kathryn M. Sutton
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000

[73] The finding that information is "materially different than information previously available" under § 2.309(f)(2)(ii) relates to the magnitude of the difference between previously available information and currently available information. *Southern Nuclear* (Vogtle), LBP-10-1, slip op. at 14 n.9.

E-mail: ksutton@morganlewis.com

COUNSEL FOR
SOUTHERN NUCLEAR OPERATING COMPANY

Dated this 23rd day of August, 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**August 23, 2010**

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER TO PROPOSED NEW CONTENTION BY CERTAIN FORMER JOINT INTERVENORS in the above-captioned proceeding have been served by electronic mail as shown below, this 23rd day of August, 2010, and/or by e-submittal.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chair
E-mail: gpb@nrc.gov

Administrative Judge
Nicholas G. Trikouros
E-mail: ngt@nrc.gov

Administrative Judge
James F. Jackson
E-mail: jxj2@nrc.gov
jackson538@comcast.net
Moanica M. Caston, Esq.

Southern Nuclear Operating Company, Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B-022
Birmingham, AL 35201-1295
E-mail: mcaston@southernco.com

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D-21
Washington, DC 20555-0001
Patrick A. Moulding, Esq.
Sarah Price, Esq.
Jody C. Martin, Paralegal
E-mail: patrick.moulding@nrc.gov,
sap1@nrc.gov
jcm@nrc.gov

M. Stanford Blanton, Esq.
C. Grady Moore, III, Esq.

Leslie G. Allen, Esq.
Peter D. LeJeune, Esq.
Kenneth C. Hairston, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2014
E-mail: sblanton@balch.com;
gmoore@balch.com;
lgallen@balch.com;
plejeune@balch.com;
kchairston@balch.com

Kathryn M. Sutton, Esq.
Steven P. Frantz, Esq.
Paul M. Bessette, Esq.
Diane A. Eckert, Admin. Assist.
Morgan, Lewis & Bockius, LLP
Co-Counsel for Southern Nuclear Operating Company, Inc.
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail: ksutton@morganlewis.com
sfrantz@morganlewis.com
pbessette@morganlewis.com
deckert@morganlewis.com

Georgia Women's Action for New Directions (WAND), Blue Ridge Environmental Defense League (BREDL), and Center for Sustainable Coast (CSC)

Robert B. Haemer, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122
E-mail: robert.haemer@pillsburylaw.com

Nuclear Energy Institute
1776 I Street, N.W., Suite 400
Washington, D.C. 20006
Jerry Bonanno, Assistant General Counsel
E-mail: jxb@nei.org

*And upon any other persons designated on the official service list compiled by the Nuclear Regulatory Commission in this proceeding.

(Original signed by M. Stanford Blanton)

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M. Stanford Blanton
Counsel for Southern Nuclear Operating Company

Dated this 23rd day of August, 2010.