

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	
	)	
Southern Nuclear Operating Company	)	Docket Nos. 52-025-COL and 52-026-COL
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	November 8, 2010
	)	

**SOUTHERN NUCLEAR OPERATING COMPANY’S  
MOTION TO STRIKE THE FILING ENTITLED “ADDITIONAL AUTHORITIES,” OR,  
IN THE ALTERNATIVE, SOUTHERN NUCLEAR OPERATING COMPANY’S  
RESPONSE TO MOVANTS’ FILING ENTITLED “ADDITIONAL AUTHORITIES”**

Pursuant to 10 C.F.R. § 2.323(a), Southern Nuclear Operating Company (“SNC”) moves to strike the filing of Blue Ridge Environmental Defense League, Center for a Sustainable Coast, and Georgia Women’s Action for New Directions (“Movants”) entitled Additional Authorities.<sup>1</sup> The Atomic Safety and Licensing Board (“Board”) should strike Movants’ filing because the filing is an impermissible supplemental reply under 10 C.F.R. § 2.309(h). That Rule provides that petitions to intervene can be followed by a response and a reply, but that “no other written answers or replies will be entertained.”

In the alternative, pursuant to the Board’s Order of November 1, 2010, SNC submits a response in Part II below for the Board’s consideration.

**I. The Board should strike Movants’ filing because it is a supplemental filing not allowed by 10 C.F.R. §2.309(h).**

Movants’ filing is prohibited by 10 C.F.R. § 2.309(h). The filing is styled as “Additional Authorities” in an apparent attempt to invoke the common practice of submitting “supplemental

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<sup>1</sup> Movants’ filing is dated October 31, 2010 in the title and dated November 1, 2010 above the signature line.

authorities” which, as has been recognized by this Board, is generally derived from Federal Rule of Appellate Procedure 28(j).<sup>2</sup> This Board has previously allowed the filing of supplemental authority where the “authority” was an opinion released after the parties’ opportunity to file pleadings had passed.<sup>3</sup> Here, rather than citing to “authority”, Movants provide reference materials intended to bolster and expand the basis and support for the proposed contention — all of which, except for the Turkey Point event notification of October 25, existed before the October 19 oral argument.<sup>4</sup> The Movants’ attempt to circumvent § 2.309(h) by styling their arguments and purported evidence as “additional authority”<sup>5</sup> is impermissible under the Commission’s rules. None of the references provided by Movants are a “supplemental authority.”<sup>6</sup>

In accordance with 10 C.F.R. § 2.323(b), counsel for SNC certifies that he made a sincere effort to confer with counsel for Movants and NRC Staff and resolve the issues raised in the motion. Those efforts were unsuccessful. NRC Staff does not agree to the motion.

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<sup>2</sup> See Memorandum (Regarding Motion to File Supplemental Authority and Other Matters), Docket No. 52-011-ESP (Feb. 9, 2007) (“We agree that the most efficacious way to bring an additional authority to the Board’s attention is a letter to the Board, with copies to other participants, setting forth the additional citation, a specific reference to the page of the pleading to which the citation applies, and a brief explanation of the reasons for the supplemental citation. Cf. Fed. R. App. P. 28(j) (governing supplemental authority citation in the federal appellate courts).”).

<sup>3</sup> See, e.g., Motion to File Supplemental Authority, Docket No. 52-011 (Feb. 2, 2007) (later treated as the “functional equivalent” to a supplemental authority letter by the Board in its Feb. 9, 2007 Memorandum); Letter from M. Stanford Blanton to Judges Bollwerk, Trikouros and Jackson, Docket Nos. 52-025-COL and 52-026-COL (Feb. 19, 2009) (providing notice to the Board and parties of *South Carolina Elec. & Gas, et al.* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-02 (2009)).

<sup>4</sup> The Turkey Point event notification of October 25, 2010 (Event No. 46362) is located on the NRC website’s Event Notification Report for October 26, 2010, at <http://www.nrc.gov/reading-rm/doc-collections/event-status/event/2010/20101026en.html>.

<sup>5</sup> To be clear, the term “authority” “refers to the precedential value to be accorded an opinion of a judicial or administrative body.” *Black’s Law Dictionary* 121 (5th ed. 1979).

<sup>6</sup> In contrast, the order called to the attention by SNC in the letter being filed contemporaneously with this response is an authority. This order is Atomic Safety and Licensing Board Order in Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-10-19 (October 28, 2010).

**II. In the alternative, should the Board not strike Movants' filing, SNC argues that the Movants' arguments are an impermissible challenge to NRC regulations.**

In the alternative, if the Board should decide not to strike Movants' filing, SNC responds as follows to the filing.

First, neither the Movants' references to the NRC Information Notice,<sup>7</sup> the reference to the discussion of ASME Section XI in the ACRS meeting, the discovery of a hole in the Turkey Point containment vessel, nor the identification of the AP1000 design basis leakage rate address the underlying defects in Safety-2 identified in the Answers of the Staff and SNC. In fact, the Additional Authorities underscore that Movants' challenge is to the design of the AP1000 and/or the regulatory requirements for containment inspections, neither of which call into question the compliance of SNC's proposed inspection program with NRC requirements.<sup>8</sup>

Moreover, none of the "Additional Authorities" address the fundamental untimeliness of Safety-2, which is required both to reopen the record under 10 C.F.R. § 2.326 and to admit the contention under 10 C.F.R. § 2.309(c).<sup>9</sup> The mere fact of additional discussion of the pre-existing facts relied on by intervenors (either in NRC information notices or in ACRS meetings) does not constitute new, material information that would satisfy the timeliness requirement under the Commission's regulations.<sup>10</sup> Neither does the discovery of a containment issue at Turkey

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<sup>7</sup> NRC Information Notice 2010-12, *Containment Liner Corrosion*, (June 18, 2010) (ML100640449).

<sup>8</sup> The fact that the offsite dose model is part of the DCD was pointed out to the Movants' representative Arnold Gundersen during the June 25, 2010 ACRS presentation by Subcommittee Chairman Ray: "Other things that you've raised about the offsite dose assumption and so on and so forth, those are more likely part of the DCD scope and have been there in that location." Transcript, ACRS Subcommittee on the Westinghouse AP1000 DCD and Vogtle Units 3 and 4 COL (June 25, 2010), at 58:18-21.

<sup>9</sup> See *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-10-19, Docket No. 50-271-LR (Oct. 28, 2010), slip op. at 24 ("As we see it, Contention 7 is based on information that has been available since the beginning of this proceeding (e.g., the AMP and NRC and Industry concerns associated with the wetting or submergence of safety-related electrical cables) and the motion to reopen is not timely under 10 C.F.R. § 2.326(a)(1)."), at 6, and at Attachment A (listing as a "Regulatory Factor[ ] Applicable to NEC Motion to Reopen to Introduce a New Contention" 10 C.F.R. § 2.309(c)(1)(i) "[g]ood cause, if any, for failure to file on time").

<sup>10</sup> *Id.* at 23-24 ("We reject the proposition that the May 10, 2010 Inspection Report entitles NEC to file a new contention at this late date. The Inspection Report revealed that, at two locations, safety-related electrical cables

Point indicate any different or new information about the AP1000 containment or SNC's proposed inspection programs beyond that in Movants' original filing.<sup>11</sup> Also, the statement by Paul Klein cited in Movants' paragraph 2, which refers to the inability to visually detect OD-initiated corrosion in steel liner and concrete containments, is not new information. Nor do Movants explain how this is applicable to the AP1000's freestanding steel shell containment.<sup>12</sup>

Movants' argument in paragraph 3 of the "Additional Authorities," that the leakage rates used in analyzing design basis accidents are 0.1 wt% per day for the first 24 hours and 0.05 wt% per day for the remaining duration of the accident, per section 15.3.6 of the AP1000 FSER,<sup>13</sup> does nothing to support Safety-2 and, in fact, demonstrates that the contention seeks to challenge design information that is final for the purposes of this proceeding. The leakage rates cited by Movants, which Movants concede are 1/25<sup>th</sup> the leakage rates upon which Movants' allegation regarding site boundary dose in the event of a failure of containment is based, are the same leakage rates used in AP1000 DCD Rev. 15.<sup>14</sup> DCD Rev. 15 was certified by NRC in Appendix

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were, in fact, submerged. But the potential for such submergence, and the need to manage and address it, has been apparent from the outset of this proceeding. ... Given this background, including the fact that the potential for submergence was anticipated and part of the AMP, the May 10, 2010 disclosure that two safety-related cables were actually submerged is not an unexpected revelation that entitles NEC to raise these issues now.”).

<sup>11</sup> See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-09, 71 NRC \_\_\_, slip op. at 12-13 (March 11, 2010) (“To the extent that Contention TC-2 challenges compliance with fire protection regulations at existing Unit 1, the Board appropriately ruled that the issue is outside the scope of this COL proceeding for proposed Units 2 and 3, and therefore fails to meet 10 C.F.R. § 2.309(f)(1)(iii). With regard to the COL application, the Board reasonably concluded that NC WARN has not met the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) because it has not demonstrated any link between the purported violations at Unit 1 and any future noncompliance or resulting safety risk affecting proposed Units 2 and 3. Contrary to NC WARN’s assertion, the Board did not find the claimed violations irrelevant in and of themselves; rather the Board pointed out that NC WARN had not shown, with more than bare assertions, how these violations were relevant to the COL proceeding.”) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC 231, 240 (2008)).

<sup>12</sup> See *id.*

<sup>13</sup> To the extent that paragraph 3 in Movants' filing only attempts to provide the correct citation from the FSER, NUREG-1793, SNC does not object to allowing the first two sentences of paragraph 3 to remain in the record. However, as explained in SNC's Motion to Strike in Part I above, the last sentence of paragraph 3 containing nothing but argument (which could have been made in the original filing for the proposed new contention or on reply) is due to be struck.

<sup>14</sup> AP1000 DCD Rev. 15, Technical Specifications (Chapter 16), section 5.5.8.

D to 10 C.F.R. Part 52, is part of the design basis for the AP1000 certified design, and is not subject to challenge in this proceeding.<sup>15</sup> No change to the site boundary dose analysis has been proposed in the pending amendment to Appendix D, which is incorporated by reference in the Vogtle 3/4 COLA. Moreover, the DCD leakage rates follow the guidance of Regulatory Guide 1.183 which provides acceptable assumptions for the dose analysis of design basis accidents.<sup>16</sup> Movants' assumption of a beyond-design-basis leakage rate does not constitute either a valid basis for a contention in this proceeding<sup>17</sup> or an "exceptionally grave issue" under 10 C.F.R. § 2.326(a).<sup>18</sup>

By asserting in paragraph 3 that "the assumed containment leak in the FSER is directed into filtered spaces" the Movants are apparently trying to show that the site boundary dose model is non-conservative in order to raise an issue of fact regarding the assumptions used in it. But Movants are incorrect. The site boundary dose model does not include filtering, as the DCD indicates in several places.<sup>19</sup> Movants cannot create an issue of fact based on their incorrect assumption about the information contained in the DCD.<sup>20</sup>

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<sup>15</sup> 10 C.F.R. § 52.63.

<sup>16</sup> See Regulatory Guide 1.183, July 2000, at 1.183-1 and Appendix A, paragraph 3.7, which provides that the primary containment should be assumed to leak at the peak pressure technical specification leak rate for the first 24 hours, and then may be reduced after the first 24 hours to 50% of the technical specification leak rate.

<sup>17</sup> See, e.g., *Progress Energy* (Shearon Harris), CLI-10-09, slip op. at 13-14 (upholding the Board's finding that the contention was inadmissible as an impermissible challenge to Commission regulations because it challenged the "one fire assumption" in the AP1000 certified design found in 10 C.F.R. Part 52, Appendix D); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-06, 53 NRC 138, 158-59 (2001) (finding a contention inadmissible as an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations because it alleged that the application lacked an analysis for a beyond-design-basis hurricane).

<sup>18</sup> *Entergy* (Vermont Yankee), LBP-10-19, slip op. at 24 n.20 ("While the Board declines to determine whether NEC has established that the issues raised in Contention 7 are 'significant,' exceptional gravity is a much higher threshold. We have no doubt in concluding that NEC has failed to show that the issues raised in Contention 7 are 'exceptionally grave.'") (citation omitted).

<sup>19</sup> The AP1000 DCD section 15.6.5 discusses the limiting Design Basis Accident of a large break LOCA. Section 15.6.5.3.3 indicates that the two release pathways considered in the analyses are the containment purge line and containment leakage, but that "[n]o credit is taken for the filters in the purge exhaust line." This subsection also notes that "[t]he majority of the releases due to the LOCA are the result of containment leakage," which is, of course, unfiltered. Additionally, as noted in section 15.6.5.3.2, "[t]he AP1000 does not include active systems for

### III. Conclusion

SNC respectfully requests that the Board strike the filing entitled “Additional Authorities.” Should the Board decline to strike this filing, SNC submits that the statements contained therein do not raise a genuine material dispute.

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](mailto:sblanton@balch.com)

Kathryn M. Sutton  
MORGAN, LEWIS & BOCKIUS, LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Phone: 202-739-3000  
E-mail: [ksutton@morganlewis.com](mailto:ksutton@morganlewis.com)

COUNSEL FOR  
SOUTHERN NUCLEAR OPERATING COMPANY

Dated this 8<sup>th</sup> day of November, 2010.

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the removal of activity from the containment atmosphere,” so active filtering is not modeled within the containment structure. Neither is there any mention of credit being taken for leakage into filtered spaces in section 15.3.6 of the AP1000 FSER or Section 15.6.5 of the AP1000 DCD. In fact, filtering was considered, but was rejected. The Severe Accident Mitigation Design Alternative (SAMDA) entitled Secondary Containment Filtered Ventilation evaluated the benefits of adding HEPA filters to the air space in the middle and lower annulus such that releases from leaks in containment into the annulus regions would be filtered. *See* AP1000 DCD, Tier 2, Appendix 1B, section 1B.1.3. This design alternative was not incorporated into the certified design.

<sup>20</sup> *In re South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-25, 70 NRC \_\_\_, (2009), slip op. at 11 (“[T]he fundamental problem is Petitioners’ misunderstanding of what is considered a [design basis flood (“DBF”)]. Petitioners drafted this contention assuming, incorrectly, that the DBF was the level at which there would be flooding of the [main cooling reservoir (“MCR”)], rather than flooding of Units 3 and 4 due to a breach of the MCR embankment. We find this contention fails to create a genuine material dispute. *See* 10 C.F.R. § 2.309(f)(1)(vi).”) (footnotes omitted); *See, also, Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), 68 NRC 431, 445-47 (2008) (refusing to admit BREDL’s Contention Three alleging that Duke’s COLA did not identify the plans for meeting its water requirements in drought conditions because the AP1000 DCD indicated that the PCS allows for safe shutdown without reliance on external water supplies).

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	)	
<b>(COL Application for Vogtle Electric</b>	)	<b>November 8, 2010</b>
<b>Generating Plant, Units 3 and 4)</b>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S MOTION TO STRIKE THE FILING ENTITLED "ADDITIONAL AUTHORITIES," OR, IN THE ALTERNATIVE, SOUTHERN NUCLEAR OPERATING COMPANY'S RESPONSE TO MOVANTS' FILING ENTITLED "ADDITIONAL AUTHORITIES" in the above-captioned proceeding have been served by electronic mail as shown below, this 8<sup>th</sup> day of November, 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](mailto:ocaamail@nrc.gov)

E-mail: [jxj2@nrc.gov](mailto:jxj2@nrc.gov)  
[jackson538@comcast.net](mailto: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](mailto:mcaston@southernco.com)

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

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](mailto:hearingdocket@nrc.gov)

Administrative Judge  
G. Paul Bollwerk, III, Chair  
E-mail: [gpb@nrc.gov](mailto:gpb@nrc.gov)

Administrative Judge  
Nicholas G. Trikouros  
E-mail: [ngt@nrc.gov](mailto:ngt@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

Administrative Judge  
James F. Jackson

E-mail: [patrick.moulding@nrc.gov](mailto:patrick.moulding@nrc.gov),  
[sap1@nrc.gov](mailto:sap1@nrc.gov)  
[jcm@nrc.gov](mailto: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](mailto:sblanton@balch.com);  
[gmoore@balch.com](mailto:gmoore@balch.com);  
[lgallen@balch.com](mailto:lgallen@balch.com);  
[plejeune@balch.com](mailto:plejeune@balch.com);  
[kchairston@balch.com](mailto: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](mailto:ksutton@morganlewis.com)  
[sfrantz@morganlewis.com](mailto:sfrantz@morganlewis.com)  
[pbessette@morganlewis.com](mailto:pbessette@morganlewis.com)  
[deckert@morganlewis.com](mailto:deckert@morganlewis.com)

Atlanta Women's Action for New  
Directions  
(WAND), Blue Ridge Environmental  
Defense League (BREDL), Center for  
Sustainable Coast (CSC), Savannah  
Riverkeeper and Southern Alliance for  
Clean Energy (SACE)

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

John D. Runkle  
Counsel for WAND, BREDL, and CSC  
P.O. Box 3793  
Chapel Hill, North Carolina 27515  
E-mail: [jrunkle@pricecreek.com](mailto:jrunkle@pricecreek.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](mailto: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 8<sup>th</sup> day of November, 2010.