

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-10-21

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James F. Jackson

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Vogtle Electric Generating Plant, Units 3 and 4)

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

ASLBP No. 10-903-01-COL-BD02

November 30, 2010

MEMORANDUM AND ORDER
(Ruling on Request to Admit New Contention)

Styling themselves as Joint Intervenors, three public interest groups -- Blue Ridge Environmental Defense League (BREDL), the Center for a Sustainable Coast (CSC), and Georgia Women's Action for New Directions (Georgia WAND) -- have filed an August 12, 2010 request (as amended on August 13) to admit a new contention into the previously terminated contested portion of this 10 C.F.R. Part 52 combined license (COL) proceeding. That contention, denoted as SAFETY-2, challenges aspects of the containment/coating inspection program associated with the COL application (COLA) of Southern Nuclear Operating Company (SNC) for authorization to construct and operate two Westinghouse Electric Company Advanced Passive (AP)1000 units at SNC's existing Vogtle Electric Generating Plant (VEGP) facility located near Waynesboro, Georgia. Both SNC and the NRC staff oppose admitting the new contention, one or the other arguing that Joint Intervenors have failed to establish (1) their standing to participate in this proceeding; (2) their compliance with the record reopening, nontimely filing, and/or new contention filing requirements of 10 C.F.R. §§ 2.309(c), (f)(2), 2.326;

and (3) the admissibility of the contention in accord with the standards in 10 C.F.R. § 2.309(f)(1). Additionally, SNC asserts that the Licensing Board should not grant Joint Intervenors' September 22, 2010 motion for leave to file out of time their reply to the respective August 23 and September 2, 2010 SNC and staff answers to their contention admission request, which would preclude the Board from considering the contents of that reply filing in ruling on Joint Intervenors' contention admission request.

For the reasons set forth herein, the Board concludes that (1) Joint Intervenors' motion for leave to file reply out of time is granted; (2) Joint Intervenors have established their standing to participate in this proceeding; (3) Joint Intervenors' request to admit a new contention fails to meet the applicable record reopening, nontimely intervention request submission, and new contention filing standards; and (4) Joint Intervenors' proposed contention SAFETY-2 fails to meet the applicable contention admission standards. As a consequence, we deny their motion to admit a new contention, which once again terminates the contested portion of this COL proceeding before the Board.

I. BACKGROUND

A. Licensing Board 1

In March 2008, SNC applied under Part 52 of the agency's regulations for a COL to construct and operate the proposed new Units 3 and 4 at the existing two-unit VEGP site. See [SNC]; Notice of Receipt and Availability of Application for a [COL], 73 Fed. Reg. 24,616, 24,616 (May 5, 2008). On November 17, 2008, five public interest groups, which were referred to as Joint Petitioners,¹ filed a petition to intervene in this proceeding challenging SNC's COLA. See

¹ Joint Petitioners included Atlanta Women's Action for New Directions, BREDL, CSC, Savannah Riverkeeper, and Southern Alliance for Clean Energy. See Licensing Board

(continued...)

LBP-09-3, 69 NRC 139 (2009). A licensing board granted the hearing request, agreeing that Joint Petitioners established the requisite standing to intervene and submitted one admissible contention, denoted as SAFETY-1, that questioned the completeness of the COLA's consideration of low-level radioactive waste (LLRW) storage and disposal. See id. at 146. On appeal, the Commission declined to disturb the board's admission of SAFETY-1. See CLI-09-16, 70 NRC 33, 34 (2009).

Thereafter, the five groups, which were referred to as Joint Intervenors following their admission as parties to the proceeding, filed a motion to amend SAFETY-1 that the board then granted. See Licensing Board Memorandum and Order (Ruling on Motion to Amend Contention) (Jan. 8, 2010) at 10-11 (unpublished). In the same January 2010 order amending contention SAFETY-1, the board provided a procedural path forward for the litigation, declaring that the next step would be to see if the merits of the contention, which the board described as raising a legal issue, could be resolved on motions for summary disposition. See id. at 9-10 (citing 10 C.F.R. § 1205(c)).

SNC subsequently filed a motion seeking summary disposition on contention SAFETY-1, and in May 2010 the board granted SNC's request. See LBP-10-8, 71 NRC __, __ (slip op. at 17) (May 19, 2010). The board concluded that the deficiencies alleged by Joint Intervenors in contention SAFETY-1, i.e., not providing detailed information regarding the design, location, and worker health impacts of a contingent onsite LLRW storage facility, did not, as a matter of law, constitute a deficiency in SNC's COLA. See id. at __ (slip op. at 13-14). The board's conclusion followed from a determination that 10 C.F.R. § 52.79, which sets forth requirements for SNC's final safety analysis report (FSAR), while possibly requiring such detailed information for "a

¹(...continued)
Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) at 1 n.1 (unpublished) [hereinafter Initial Prehearing Order].

component of the facility to be constructed under the COL,” did not require such information for a contingent facility like that which might later need to be constructed for Units 3 and 4. Id. at __ (slip op. at 12).

With the resolution of contention SAFETY-1, no contentions remained before the board. See id. at __ (slip op. at 17). Moreover, because no party sought Commission review of the SAFETY-1 ruling pursuant to 10 C.F.R. § 2.341(b)(1) and the Commission did not take sua sponte review of the board’s decision in accord with section 2.341(a)(2), the contested portion of the SNC COL proceeding was effectively terminated. See Licensing Board Memorandum (Referring Request to Admit New Contention to the Commission) (Aug. 17, 2010) at 2 (unpublished) [hereinafter New Contention Referral].

B. Licensing Board 2

Although the first Vogtle COL licensing board thus ceased to exist, on August 12, 2010, the three public interest groups that now refer to themselves as Joint Intervenors submitted a request to that board seeking the admission of a new contention, SAFETY-2, challenging the adequacy of SNC's containment/coating inspection program for proposed reactor Units 3 and 4. See Proposed New Contention by Joint Intervenors Regarding the Inadequacy of Applicant’s Containment/Coating Inspection Program (Aug. 12, 2008) at 1, 4 [hereinafter Motion for New Contention]. Finding that prior termination of the contested portion of the SNC COL proceeding meant that jurisdiction for Joint Intervenors’ request resided with the Commission rather than the previously-formed board, the chairman of that board referred Joint Intervenors’ request to the Commission. See New Contention Referral at 2-3. The Commission, in turn, sent the request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for consideration under 10 C.F.R. §§ 2.309(a), (c). See Commission Order (Aug. 25, 2010) at 1 (unpublished). On August 27, 2010, the Chief Administrative Judge appointed this Licensing

Board to preside over the admission of, and any subsequent litigation regarding, the proposed contention raised by Joint Intervenors in their August 2010 new contention motion.² See [SNC,] Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 53,985 (Sept. 2, 2010).

On August 30, 2010, this Board issued a memorandum and order establishing several administrative and scheduling directives for the new proceeding. Initially, the Board indicated that the procedures set forth in the initial prehearing order issued by the first board applied with equal force to the proceeding now before it. See Licensing Board Memorandum and Order (Setting Balance of Initial Briefing Schedule and Oral Argument) (Aug. 30, 2010) at 2 (unpublished) [hereinafter Order Setting Initial Briefing Schedule]. Further, with the SNC answer to Joint Petitioners' new contention motion already having been filed, see [SNC] Answer to Proposed New Contention by Certain Former Joint Intervenors (Aug. 23, 2010) [hereinafter SNC Answer], the Board set a due date for the staff's answer to Joint Intervenors' new contention motion, along with a September 10, 2010 date for Joint Intervenors' reply to the SNC and staff answers. See Order Setting Initial Briefing Schedule at 2. Finally, the Board proposed several dates for an initial prehearing conference/oral argument regarding the new contention motion. See id. After receiving input from the participants, the Board set the oral argument for September 17, 2010. See Licensing Board Memorandum and Order (Initial Prehearing Conference Schedule; Opportunity for Written Limited Appearance Statements) (Sept. 3, 2010) at 1 (unpublished).

Nonetheless, on September 10, 2010, the date upon which Joint Intervenors were due to submit their reply to the SNC and staff answers, the attorney who previously had entered an appearance on behalf of Joint Intervenors withdrew from this proceeding. See Notice of

² This Board, while comprised of the same members as the first board that was convened for the SNC COL proceeding, is a separate and distinct entity.

Withdrawal for James B. Dougherty, Esq. (Sept. 10, 2010) [hereinafter Dougherty Withdrawal]. On that same date, however, Louis Zeller entered an appearance in the proceeding as a non-attorney representative for BREDL, see Notice of Appearance for Louis A. Zeller (Sept. 10, 2010) [hereinafter Zeller Appearance], although neither BREDL, nor CSC, nor Georgia WAND filed a reply to the SNC and staff answers on that due date. See Licensing Board Memorandum and Order (Canceling Scheduled Oral Argument; Setting Schedule for Further Submission by Joint Intervenors) (Sept. 13, 2010) at 2 (unpublished) [hereinafter Order Canceling Argument].

On September 13, 2010, Licensing Board Law Clerk Wen Bu contacted Mr. Zeller regarding Joint Intervenors' continued participation in this proceeding. At that time, Mr. Zeller indicated the withdrawal of Joint Intervenors' counsel had been unexpected, but BREDL and the other organizations were attempting to find other representation and did intend to make an additional filing in the proceeding, although Mr. Zeller could not say when that filing might be submitted. See id. Given the circumstances, the Board canceled the September 17 argument and set a deadline of September 22, 2010, for Joint Intervenors to (1) submit a notice of appearance for new counsel; and (2) either submit (a) a notice withdrawing their new contention motion, or (b) a motion seeking leave to file their reply late, with an accompanying reply pleading. See id. at 3.

On September 22, Joint Intervenors filed a motion for leave to file out of time, a notice of appearance from a new counsel, and a reply to the SNC and staff answers. See Motion for Leave to File Out of Time (Sept. 22, 2010) [hereinafter Motion for Leave to File]; Notice of Appearance for John D. Runkle, Esq. (Sept. 22, 2010); Joint Intervenors' Reply to SNC and NRC Staff Answers (Sept. 22, 2010) [hereinafter Joint Intervenors Reply]. Subsequently, in a September 23 issuance, the Board set a September 29 due date for responses by SNC and the staff to Joint Intervenors' motion for leave to file out of time. See Licensing Board Memorandum

and Order (Scheduling Regarding Joint Intervenors' Reply-Related Filings) (Sept. 23, 2010) at 1 (unpublished) [hereinafter Reply Schedule Order]. In the subsequent SNC and staff responses, only SNC objected to Joint Intervenors' motion for leave to file their reply out of time. See [SNC] Response to Joint Intervenors' Motion for Leave to File Out of Time (Sept. 29, 2010) at 1 [hereinafter SNC Motion Response]; NRC Staff's Answer to Petitioners' Motion for Leave to File Out of Time (Sept. 28, 2010) at 1, 3 [hereinafter Staff Motion Response].

In its September 23, 2010 order, the Board also proposed dates and times during the week of October 4, 2010, for the prehearing conference/oral argument originally scheduled for September 17 regarding the admission of contention SAFETY-2. See Reply Schedule Order at 1-2. Joint Intervenors' counsel, however, was unavailable that week due to pre-existing foreign travel plans. See Response to Atomic Safety and Licensing Board Order Regarding Oral Argument Dates (Sept. 27, 2010) at 1; see also Joint Intervenors' Response to Memorandum and Order (Sept. 27, 2010) at 1. As a consequence, after further consultation with the participants, the Board set October 19, 2010, for the prehearing conference/oral argument. See Licensing Board Memorandum and Order (Schedule Regarding Initial Prehearing Conference/Oral Argument) (Sept. 29, 2010) at 2 (unpublished). Thereafter, on October 19, 2010, the Board held a half-day prehearing conference in the Panel's Rockville, Maryland hearing room during which it heard oral argument concerning the admissibility of contention SAFETY-2. See Tr. at 1-121.

II. ANALYSIS

Against this background, we turn to the various procedural issues that are presented by Joint Intervenors' new contention motion and the associated filings. According to SNC and/or the staff, these include whether (1) to accept the submission of Joint Intervenors' late-filed reply

pleading; (2) Joint Interveners have established their standing; (3) Joint Interveners' new contention motion complies with the reopening and new/nontimely filing standards of 10 C.F.R. §§ 2.309(c), (f)(2), 2.326; and (4) contention SAFETY-2 is admissible under the section 2.309(f)(1) standards. See SNC Answer at 2-4; NRC Staff's Answer to Petition (Sept. 2, 2010) at 1 [hereinafter Staff Answer]; SNC Motion Response at 1. We begin our analysis of these various items with Joint Interveners' motion for leave to file their reply out of time, given that the information in that reply may be pertinent to the other procedural issues that SNC and the staff claim are applicable in considering the adequacy of Joint Interveners' motion/petition.

A. Motion for Leave to File Reply Out of Time

DISCUSSION: Motion for Leave to File at 1; SNC Motion Response at 1-3; Staff Motion Response at 1-2; Tr. at 46-47, 65-66, 96.

RULING: Joint Interveners' reply pleading was not filed on the September 10, 2010 due date established by the Board, nor did they, in accord with this Board's initial order, see Order Setting Initial Briefing Schedule at 2 (citing Initial Prehearing Order), file a timely motion before the due date seeking to extend the time for submitting their reply pleading. They did, however, provide a motion for leave to file out of time, in support of which they have provided Mr. Zeller's declaration in which he states that on September 10 he was informed for the first time by Joint Interveners' former counsel James B. Dougherty that Mr. Dougherty would be unable timely to file his clients' reply. See Motion for Leave to File, unnumbered attach. at 1 (Affidavit of Louis A. Zeller Regarding ASLB Initial Prehearing Order (Sept. 22, 2010)) [hereinafter Zeller Affidavit]. According to Mr. Zeller, before that time, he was unaware of any problems with counsel meeting this filing deadline. See id.

Although the staff does not oppose Joint Petitioners' motion for leave to file out of time, in its response SNC argues that Joint Interveners failed to explain adequately the reasons for

their delay in submitting their reply. In this regard, SNC notes that the “affidavits submitted with Joint Intervenors’ Reply, purporting to support Joint Intervenors’ claim of standing, are each dated more than a week after the Reply was originally due, suggesting that Joint Intervenors had not provided any information to their former counsel to support this critical issue by the time the Reply was due.” SNC Motion Response at 2. SNC further asserts that a motion to file late should generally be denied, except under extraordinary conditions. See id. & n.6 (citing Tenn. Valley Auth. (Bellefonte Nuclear Plant, Units 1 & 2), CLI-10-26, 72 NRC __, __ & n.18 (slip op. at 3-4 & n.18) (Sept. 29, 2010)). SNC claims that Joint Intervenors might have justified filing out of time by demonstrating that they “supported their former counsel’s need for information upon which to base his Reply,” but having failed to make this showing, their motion should be denied. Id. at 2-3.

The Commission’s rules of practice provide the Board with substantial authority to regulate hearing procedures. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998) [hereinafter 1998 Policy Statement]; Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453-54 (1981) [hereinafter 1981 Policy Statement]. This authority encompasses, among other things, the power to set a proceeding’s schedule and to ensure compliance with that schedule. See 10 C.F.R. § 2.319 (power of the presiding officer); id. § 2.332 (general case scheduling management); id. § 2.334 (implementing hearing schedule for proceeding). In this proceeding, the Board established various deadlines in its August 30, 2010 initial briefing schedule order, including deadlines for the participants’ responsive pleadings. See Order Setting Initial Briefing Schedule at 2.

While the participants generally must comply with the proceeding’s schedule established by the presiding officer, it has been recognized that participants might, in what one might hope are rare circumstances, be unable to meet established deadlines. See 1998 Policy Statement,

48 NRC at 21. Therefore, participants are permitted to request a filing deadline extension. In this proceeding, the Board established that a participant may file a written motion for extension of time at least three business days before the due date for the pleading or other submission for which an extension is sought. See Initial Prehearing Order at 6; see also 1981 Policy Statement, 13 NRC at 454-55 (“Requests for an extension of time should generally be in writing and should be received by the Board well before the time specified expires.”). Such a time extension motion must (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate appropriate cause that supports allowing the extension. See Initial Prehearing Order at 6.

In establishing and enforcing schedule deadlines, the Board remains cognizant that it must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process. See 1981 Policy Statement, 13 NRC at 453; see also 1998 Policy Statement, 48 NRC at 18-19. The Commission has long endorsed a balanced approach to hearings -- one that both expedites the hearing process and ensures fairness -- in an effort to produce a record that leads to high quality decisions that adequately protect the public health and safety, the common defense and security, and the environment. See 1998 Policy Statement, 48 NRC at 19; 1981 Policy Statement, 13 NRC at 453. To achieve these ends, the Commission regards “good sense, judgment, and managerial skills” as the proper guideposts for conducting an efficient hearing. 1981 Policy Statement, 13 NRC at 453. While sanctions may be necessary for a participant that breaches its obligations,³ with an eye towards mitigating

³ In its 1981 Policy Statement, the Commission noted that a spectrum of sanctions from minor to severe may be employed by a Board to assist in the management of a proceeding. See 1981 Policy Statement, 13 NRC at 454 (“For example, [a board] could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, (continued...)”)

prejudice to the non-breaching participants, the Board also must tailor those sanctions to bring about improved future compliance. See 1981 Policy Statement, 13 NRC at 454.⁴

In seeking to strike the appropriate balance in this particular instance, we find instructive the Commission's recent decision in the Bellefonte construction permit proceeding in which the Commission elaborated on the standards for accepting an appeal filed out of time.⁵ See Bellefonte, CLI-10-26, 72 NRC at __-__ (slip op. at 2-5). In Bellefonte, the petitioners sought to appeal a licensing board's denial of their intervention petition. The Commission's rules accorded the petitioners ten days to appeal the board's ruling. The petitioners, however, missed the deadline, filing their appeal eight days out of time. See id. at __ (slip op. at 1-2). In a September 29, 2010 ruling, the Commission denied the petitioners' motion for additional time in which to file an appeal and dismissed the appeal. See id. at __ (slip op. at 5).

In doing so, the Commission reiterated its longstanding rule that deadlines are to be strictly enforced. According to the Commission, strict enforcement furthers the dual interests of efficient case management and prompt resolution of adjudications. See id. at __ (slip op. at 2). Only in truly "unavoidable and extreme circumstances," the Commission noted, would late filings be accepted. See id. at __ (slip op. at 3) (quoting 1998 Policy Statement, 48 NRC at 21);

³(...continued)
dismiss the party from the proceeding.")

⁴ The Commission in its 1981 Policy Statement, 13 NRC at 454, mentioned a list of factors to aid in selecting the appropriate sanction, including

the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances.

⁵ The Board notes that the same attorney, James B. Dougherty, represented both the late-filing petitioners in Bellefonte and, until his withdrawal, the late-filing Joint Intervenors in this proceeding.

see also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998) (“extraordinary and unanticipated circumstances” (quoting Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-684, 16 NRC 162, 165 n.3 (1982))). The Commission concluded, however, that the circumstances surrounding the Bellefonte petitioners' late filing were not unavoidable and extreme so as to support their motion for additional time.

In making this determination, the Commission relied upon several factors. First, the Commission observed that a party at risk of filing out of time arguably never needs to file out of time because the party can first request an extension, doing so “well before the time specified expires.” Bellefonte, CLI-10-26, 72 NRC at __ (slip op. at 4) (quoting 1981 Policy Statement, 13 NRC at 455). In Bellefonte, the petitioners had the opportunity to request an extension of the appeal filing deadline in a timely fashion, but failed to do so. The Commission also noted that the petitioners knew when the board would likely issue its decision with an appeal deadline ten days later, but the petitioners took no advanced action to request an extension for filing their appeal. See id. at __ (slip op. at 3).

A second element of concern to the Commission in Bellefonte was the need for a participant filing out of time to offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand. See id. at __ n.17 (slip op. at 3 n.17). In that regard, however, the Commission did not find counsel's alleged unfamiliarity with the agency's rules of practice, see id. at __ (slip op. at 3) (citing Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-91-5, 33 NRC 238, 240 (1991)), or counsel's asserted busy schedule, see id. (slip op. at 3) (citing 1981 Policy Statement, 13 NRC at 454), to be satisfactory explanations.

In contrast, if a party can demonstrate that its filing out of time was truly the product of unavoidable and extreme circumstances, then the agency's case law indicates that the filing

may be accepted on a motion for leave to file out of time. For instance, in Kansas Gas & Electric, an appeal board accepted a filing that was three days late, which the board characterized as not “excessively late,” based on findings that the intervenor offered a reasonable explanation for the delay and the three-day delay did not prejudice any of the other parties to the proceeding. Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 124 (1977).

With this precedent in mind, the Board concludes that in this proceeding Joint Intervenors have adequately demonstrated their reply was filed out of time because of unavoidable and extreme circumstances. On September 10, 2010, Joint Intervenors attorney informed the BREDL representative for the first time that he would not be able to file the reply due that day, after which he withdrew as counsel. See Zeller Affidavit at 1; Dougherty Withdrawal at 1. According to Joint Intervenors, given that the reply was due that day, they were unable to file a timely reply or even a timely motion requesting an extension to file a reply later, which under the Board’s earlier directive would have been due three business days earlier. See Motion for Leave to File at 1; Order Setting Initial Briefing Schedule at 2; Initial Prehearing Order at 6. We agree with Joint Intervenors that the unexpected action of their former attorney,⁶ which left them without a responsive pleading on the day that pleading was

⁶ In light of Mr. Zeller’s simultaneous appearance as a nonattorney representative for BREDL, the Board did not address whether an attorney who has filed a notice of appearance in an NRC adjudicatory proceeding may unilaterally withdraw in the circumstances presented here. No Commission rule appears to apply directly to such a situation, although 10 C.F.R. § 2.314(a) broadly provides that parties and their representatives are expected to conduct themselves “as they should before a court of law.” Absent written consent of the party and the prior appearance of another attorney, many courts require a motion to withdraw. See, e.g., D.D.C. R. 83.6(c). Further, ethical rules in most jurisdictions generally do not permit an attorney to withdraw from representing a client unless withdrawal can be accomplished without material adverse effect to the client’s interests. See, e.g., D.C. Rules of Prof’l Conduct R. 1.16. Suffice it to say, the Board finds Mr. Dougherty’s apparent abandonment of his client, on the day its reply was due, extremely troubling.

due or any opportunity to file a timely motion requesting an extension of the filing deadline, presents the type of unavoidable and extreme circumstances that support the grant of a motion for leave to file out of time. To be sure, the agency's rules of practice permit a participant to appear on its own behalf, but the timing of the unexpected withdrawal of Joint Intervenors' counsel presented a setback not easily overcome in an afternoon,⁷ and in this instance provides a satisfactory explanation for their request to file out of time.⁸

Accordingly, we grant Joint Intervenors' motion to file their reply out of time.

B. Procedural Items Applicable to the Admission of Contention SAFETY-2

With Joint Intervenors' reply now before us, we consider its contents, as well as the information and arguments provided in Joint Intervenors' original contention admission request and the SNC and staff answers to that request in determining whether the three organizations that constitute Joint Intervenors have made the appropriate procedural showings to support the admission of contention SAFETY-2. We begin with Joint Intervenors' standing, then move on to the various timeliness factors associated with Joint Intervenors' proposed contention, and

⁷ While not constituting a proper motion requesting an extension, Mr. Zeller's September 10, 2010 notice of appearance, see Zeller Appearance at 1, does indicate that there was a desire on the part of Joint Intervenors to remain active participants in this proceeding despite the setback of having lost their attorney.

⁸ In this regard, we do not find compelling SNC's assertion that Joint Intervenors must provide more information regarding their prior diligence, namely whether Joint Intervenors "supported their former counsel's need for information upon which to base his Reply." SNC Motion Response at 2; see Tr. at 65-66. Joint Intervenors' efforts to find new representation, submit a timely motion for leave to file out of time, and submit a timely reply in accordance with the Board's September 13, 2010 order within twelve days of their former counsel's unexpected withdrawal effectively counters any notion that they needed to make a further showing regarding their diligence in this proceeding. Moreover, SNC has not articulated any specific prejudice that it may experience if Joint Intervenors' motion for leave to file their reply out of time is granted. See Wolf Creek, ALAB-424, 6 NRC at 126 (1977) (permitting intervenor's appeal three days out of time, when applicants' motion to strike failed to "even hint at prejudice"). Although SNC raises the specter of unacceptable delay to the entire Vogtle COL proceeding, see SNC Answer at 1, the effect of accepting Joint Intervenors' reply out of time is, even at this late juncture in the proceeding, marginal.

finally consider the contention admissibility factors. In each instance, we provide a background discussion regarding the legal standards that govern that item. We then analyze the applicability of that item to Joint Intervenors' request and, as appropriate, whether Joint Intervenors have met those standards so as to permit contention SAFETY-2 to be admitted for litigation in this proceeding.

1. Joint Intervenors Standing

a. Standards Governing Standing

In determining whether an individual or organization should be granted party status in a proceeding based on standing "as of right" consistent with 10 C.F.R. § 2.309(d), the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011-2297; National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been an essential element in establishing the requisite standing elements. See Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has formally authorized the organization to represent his or her interests. See Vt. Yankee Nuclear Power Corp. & Amergen Vt., LLC (Vt. Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000). In assessing a petition to determine whether these elements are met, which a licensing

board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." Ga. Inst. of Tech. (Ga. Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 115 (1995).

Additionally, in the context of this proceeding, the contested portion of which Joint Intervenors now seek to resurrect by gaining the admission of a new contention, several other principles govern the timing of and support for a standing claim. Potentially pertinent is the Commission's case law that a petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought. See PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC __, __ (slip op. at 6) (Jan. 7, 2010) (citing Crow Butte Res. Inc. (License Renewal for In Situ Leach Facility, Crawford, Neb.), CLI-09-9, 69 NRC 331, 343 (2009); Tex. Utils. Elec. Co. (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)). Also of possible relevance, given Joint Intervenors' reply filing is their only pleading in which they address their standing, are recent cases that have recognized that a petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading. See id. at 8; S.C. Elec. and Gas Co. and S.C. Pub. Serv. Auth. (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC __, __ (slip op. at 7) (Jan. 7, 2010).

We apply these precepts below in evaluating whether Joint Intervenors must establish their standing and, assuming that is required, whether they have made the requisite showings.

b. Analysis of Joint Intervenors Standing

DISCUSSION: SNC Answer at 5-6; Staff Answer at 3-7; Joint Intervenors Reply at 6-7; Tr. at 63, 66-67, 97-99, 113-14.

RULING: With the first licensing board's May 2010 unchallenged summary disposition ruling in favor of SNC regarding the sole admitted contention in this proceeding (i.e., contention

SAFETY-1), the contested portion of this case was terminated. As a consequence, to interpose a new contention now requires the submission of a “fresh intervention petition” that fulfills the applicable standards that govern such filings, presumably including an appropriate standing demonstration. U.S. Army Installation Command (Schofield Barracks, Oahu, Haw. & Pohakuloa Training Area, Island of Haw., Haw.), CLI-10-20, 72 NRC __, __ & n.56 (slip op. at 12 & n.56) (Aug. 12, 2010). Given that Joint Intervenors did not address standing in their request to admit a new contention, the outstanding question thus becomes whether the showing that was made in Joint Intervenors’ reply pleading constitutes a sufficient presentation to establish their standing.

What the three petitioning organizations have provided are affidavits from each organization’s executive director that state the following: (1) the organization previously filed in this COL proceeding declarations from one or more individuals who live within fifty miles of the VEGP site and who have authorized the organization to represent their interests regarding issuance of the Vogtle COL; and (2) the organization, which is continuing to represent those residents’ interests, has not had a substantial change in its status or its standing regarding its participation in this proceeding. See Joint Intervenors Reply, unnumbered attachs. 2-4 (Declarations of Janet Marsh, David Kyler, and Barbara Paul). Both SNC and the staff maintain that these showings are inadequate to establish Joint Intervenors’ standing.

As a general rule, it is not sufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or, at the very least, providing a submission that updates the factual information that was provided previously. See Bell Bend, CLI-10-7, 71 NRC at __ (slip op. at 6). “[B]ecause a petitioner’s circumstances may change from one proceeding to the next,” it is important that the presiding officer have up-to-date information regarding any standing claims. Id.

The question here is whether the showing made in the Joint Intervenors' affidavits is sufficient to fulfill these requirements. They did not make a new presentation, choosing instead to reference the factual showing made previously in their November 2008 initial intervention petition. In this instance, the referenced material is in the record of this COL proceeding, albeit a record that was developed under the aegis of another licensing board. Looking at the information that exists in the record, several individuals provided affidavits indicating that they live within fifty miles of the VEGP site and that they authorize BREDL or CSC to represent their interests. Additionally, each affidavit filed in support of Joint Intervenors' reply includes a statement that, although perhaps not the most precisely worded, nonetheless indicates there is "no substantial change" in the circumstances that were the basis upon which these organization's relied in seeking to establish their standing previously.⁹ Accordingly, under the circumstances here, we conclude that BREDL and CSC have provided information that is on the docket of this proceeding and a certification of its continuing validity sufficient to establish their standing in this proceeding.¹⁰

⁹ Assuming a potential intervenor wishes to rely upon standing-related information already in the record of a proceeding, the central issue is whether that information is materially the same as when it was originally submitted. Thus, if the factual showing that the residence of an individual was within fifty miles of a facility was previously relied upon to establish standing, the certification necessary by a potential intervenor would be that there has not been a material change in that factual situation in the interim. Put another way, if during the pendency of a COL proceeding the individual in question has moved from a residence that was 25 miles from the facility to one that is 35 miles from the facility, a potential intervenor to the COL proceeding properly could certify that there has not been a material change in the circumstances that are necessary to establish its standing. It is, of course, the burden of the potential intervenor to ascertain whether such a representation is, in fact, correct and to provide an appropriate sworn statement making the necessary certification.

¹⁰ In this regard, we find the circumstances before us to be more in line with the situation that the Commission in the Comanche Peak proceeding suggested might be sufficient to allow a petitioner to rely on a prior standing demonstration, that is, "if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing." Comanche Peak, CLI-93-4, 37 NRC at 163. Certainly, the November 2008 showings
(continued...)

With respect to Georgia WAND, a somewhat different set of circumstances are in play given that Georgia WAND was not previously admitted as a party to this COL proceeding. Instead, another organization, the Atlanta Women's Action for New Directions (Atlanta WAND), was admitted as a party in the proceeding. Although the Georgia WAND affidavit attached to Joint Intervenors' reply makes no mention of Atlanta WAND, in a November 27, 2010 e-mail addressed to the Board Chairman, the Executive Director of Georgia WAND stated that "[w]hen we began our legal interventions on the Vogtle reactor project we were Atlanta WAND but we have since changed our name to better reflect our membership and reach across the state of Georgia." Licensing Board Memorandum and Order (Forwarding E-Mail for Placement in the Record) (Sept. 27, 2010) attach. (unpublished). In this instance, we find this information sufficient to clarify the status of Georgia WAND relative to Atlanta WAND and provide support adequate to underpin a determination that Georgia WAND likewise has established its standing to participate in this aspect of the Vogtle COL proceeding.

With the standing of the three petitioners established, we turn to a consideration of whether Joint Intervenors' request to admit a new contention meets the various threshold requirements potentially applicable to their filing, including the standards governing record reopening and the admission of untimely intervention petitions and new contentions.

¹⁰(...continued)
referenced by Joint Intervenors are considerably more contemporaneous with this proceeding than those (over four years old) that were sought to be relied upon by the Comanche Peak petitioner.

2. Reopening the Record

a. Standards Governing Reopening

Once the record of a proceeding is closed, new information may not be considered in the proceeding unless the reopening standards under 10 C.F.R. § 2.326(a) are met.¹¹ See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-21, 124-25 (2005) (affirming licensing board ruling that petitioners seeking to introduce new contentions after the board had denied their initial petition to intervene needed to address the reopening standards). Section 2.326 states that for a motion to reopen to be granted:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a)(1)-(3); see also Entergy Nuclear Vt. Yankee, L.L.C., & Entergy Nuclear Operations, Inc. (Vt. Yankee Nuclear Power Plant), LBP-10-19, 72 NRC __, __-__ (slip op. at 20-27) (Oct. 28, 2010) (discussing and analyzing reopening standards).

Relative to these reopening standards, a licensing board should consider both the timing and the significance of the issue raised in a motion to reopen such that a timely motion may be denied if it raises issues that “are not of ‘major significance to plant safety,’” while a nontimely motion may be granted if it raises an issue of sufficient gravity. See Vt. Yankee Nuclear Power

¹¹ Ordinarily, once a licensing board has concluded board action on a licensing case, jurisdiction to decide a motion to reopen regarding that proceeding passes to the Commission, which retains jurisdiction until the license in question has been issued. See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35-36 (2006). In this proceeding, however, the Secretary of the Commission’s referral of Joint Intervenors’ motion to the ASLBP (and the subsequent establishment of this Board) gave this Board jurisdiction over the motion. See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-21 (2009).

Corp. (Vt. Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (quoting Vt. Yankee Nuclear Power Corp. (Vt. Yankee Nuclear Power Station, ALAB-124, 6 AEC 358, 365 (1973))). In that regard, an untimely motion to reopen must demonstrate that the issue raised “is not merely ‘significant’ but ‘exceptionally grave.’” Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-886, 27 NRC 74, 78 (1988), cited with approval in Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000).

A motion to reopen also must be accompanied by affidavits that “set forth the factual and/or technical bases for the movant’s claim that the criteria of paragraph (a) of this section have been satisfied,” including addressing each of the reopening criteria “separately” with “a specific explanation of why it has been met.” 10 C.F.R. § 2.326(b). Additionally, if the motion to reopen “relates to a contention not previously in controversy among the parties,” the movant must meet the nontimely filing requirements of 10 C.F.R. § 2.309(c). Id. § 2.326(d). The Commission has stated that when a petitioner seeks to introduce a new contention after the record has been closed, it should “address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing.” Millstone, CLI-09-5, 69 NRC at 124. The Commission has also held that “the standard for admitting a contention after the record is closed is higher than for an ordinary late-filed contention,” i.e., to justify reopening the record to admit a new contention “the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition,” and the new information “must be significant and plausible enough to require reasonable minds to inquire further.” Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) (internal quotations omitted).

b. Analysis of Record Reopening as Applicable to Joint Intervenors' New Contention Admission Request

DISCUSSION: SNC Answer at 5; Staff Answer at 1 n.1; Joint Intervenors Reply at 7-13; Tr. at 35-46, 48-52, 61-62, 67-75, 99-100, 108-12.

RULING: Although not mentioned in Joint Intervenors' initial request to admit new contention SAFETY-2, as was conceded by Joint Intervenors' successor-counsel during the October 19 oral argument, see Tr. at 35, under established Commission authority, see Millstone, CLI-09-5, 69 NRC at 124-25, in an instance such as this in which the contested portion of a proceeding was terminated following an unchallenged merits determination in favor of the applicant regarding the proceeding's sole admitted contention, our focus must be on the requirements applicable to reopening a closed record now set out in 10 C.F.R. § 2.326.¹² As a consequence, we look to the various provisions in section 2.326 to determine whether Joint Intervenors can meet their burden regarding those standards.

The first factor under section 2.326(a) is whether the reopening motion is timely. As several of the participants have pointed out, however, the question of the "timeliness" of Joint Intervenors' August 12 submission is a matter that has import relative to a number of the different admission standards that are implicated by that filing, including paragraphs (c)(1) and (f)(2) of section 2.309. This "timeliness" question, in turn, depends on two different

¹² Although, for the purpose of applying the very high-threshold reopening standard, it might be possible to distinguish between attempts to reopen the closed "record" of an evidentiary hearing regarding an admitted contention and requests to reopen the overall "record" of an adjudicatory proceeding to permit the admission of a new contention, this is not the approach the Commission has taken relative to section 2.326 and its pre-2004 predecessor, section 2.734. See Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538-39 (May 30, 1986) (in response to comment that reopening standard should only apply to "motion to offer additional evidence on an issue already considered," Commission declares reopening standard applies "whenever a proponent seeks to add new information to a closed record, whether the information concerns a new contention or one which has already been heard").

considerations, i.e., what/when was the “trigger” that provided the footing for the new contention and was the motion seeking record reopening/contention admission filed timely after that “trigger” event.

Relative to the issue of the “trigger,” for their part, Joint Intervenors assert the initiating circumstance for proposed contention SAFETY-2 was a statement (or more precisely, the July 13, 2010 release of the transcript containing a statement) by the Chair of the agency’s Advisory Committee on Reactor Safeguards (ACRS) during a June 25, 2010 meeting concerning AP1000 design certification issues. See Motion for New Contention at 2-4. This statement, they assert, amounts to a determination that questions regarding containment inspections and coatings fall outside the ACRS’s purview as it looks at generic design certification issues. That observation, Joint Intervenors contend, gave them cause to submit a new contention in this site-specific adjudicatory proceeding, which they did on August 12 along with the supporting affidavit of their expert, Arnold Gundersen, and the April 2010 Fairewinds Associates, Inc. (FAI) report that Mr. Gundersen helped author and upon which Joint Intervenors rely as a primary technical support for their new contention. See id. at 6-7. On the other hand, SNC and the staff maintain that the issues Joint Intervenors now wish to raise could have been proffered in November 2008 when the intervention petition was originally submitted in this case or, according to SNC, based on the information cited by the April 2010 FAI report, at the latest shortly after September 2009. See SNC Answer at 11-16; Staff Answer at 10-11.

We do not need to explore the question whether Joint Intervenors had the information, or the technical/financial wherewithal to obtain such an analysis, at the time an intervention petition was originally scheduled to be filed in this proceeding. Even assuming the relevant informational “trigger” did not exist at that juncture, it clearly did exist in April 2010 when the FAI report was issued, at which time Joint Intervenors could have submitted an appropriate pleading

seeking admission of a contention based on that report.¹³ Joint Intervenors' attempt to assign significance to the ACRS Chair's purported characterization of the report and the issues it raises is a delineation that, even if correct, is irrelevant. Joint Intervenors have an ongoing, independent responsibility to identify and interpose issues into this proceeding on a timely basis. For reasons best known to Joint Intervenors,¹⁴ they chose in April 2010 to present their FAI report-based concerns to the ACRS without, as they could have, also seeking to introduce them into this proceeding for consideration as to whether they constituted an appropriate subject for further litigation. With the FAI report's issuance in late-April 2010 being the "trigger" for any Joint Intervenor contention based in substantial part on the FAI report, given the presumptive need to submit a new contention within thirty days of that "trigger" date (i.e., by late May 2010),¹⁵ their attempt to bring contention SAFETY-2 into this proceeding in mid-August 2010, nearly four months after the "trigger" date, cannot be considered timely.

¹³ In addition to being two of the groups that make up the Joint Intervenors, BREDL and Georgia WAND are members of the AP1000 Oversight Group that first submitted the FAI report to the ACRS on April 21, 2010. See Letter from John D. Runkle, AP1000 Oversight Group Counsel, to Dr. Said Abdel-Khalik, ACRS Chairman, at 1 (Apr. 21, 2010) (ADAMS Accession No. ML101230513).

¹⁴ Joint Intervenors also reference a June 2010 staff issuance, NRC Information Notice No. 2010-12, asserting that it is an important indicator of the staff's realization of the gravity of the containment problem. See Tr. at 110. The relevant inquiry here, however, is not the staff's recognition of when there was a problem, but rather when Joint Intervenors reasonably should have realized that a litigable issue existed. In this case that clearly was, at the latest, in April 2010 with issuance of the FAI report regarding the AP1000 containment.

¹⁵ In conformity with what other licensing boards generally have done, the time frame for submitting a new contention following the "trigger" date is 30 days. See Initial Prehearing Order at 6 n.6. Although the first Vogtle COL licensing board issued the summary disposition ruling that resolved all contested matters before that board 28 days after the issuance of the FAI report, see supra p. 3, any motion to admit a new contention could have been filed before the Commission or lodged with the Board with the reasonable expectation that it would be appropriately referred. See New Contention Referral at 2-3.

Joint Intervenors thus having failed to meet the section 2.326(a)(1) timeliness requirement, we must consider the “safety valve” provision included with that standard, i.e., whether the issue is “exceptionally grave” such that it should be considered even if untimely. We are unable to conclude that the proposed contention SAFETY-2 meets that very high threshold. Certainly, containment leakage is a concern, whatever the cause. But, as was noted during the oral argument, see Tr. at 115-16, the degree to which the information regarding current containment coating and inspection issues utilized in support of the FAI report has any applicability to the AP1000 containment is far from clear, and certainly not compelling enough for us to consider this a matter that is “exceptionally grave” within the meaning of section 2.326(a)(1).

As to the remaining applicable section 2.326(a)(3) standard,¹⁶ which requires that the motion demonstrate that a materially different result would be likely had the new “evidentiary” information been considered initially, it is clear from the case law regarding reopening motions that the evidentiary basis of the information must be sufficient to avoid a summary disposition motion. See supra section II.B.2.a. In this instance, however, there is nothing in the Gundersen affidavit or the documentary material provided as “evidentiary” support for the motion that provides any information that would suggest Joint Intervenors’ alleged concern regarding the AP1000 design has any particular significance for the proposed Vogtle units that would merit resolution in this adjudicatory proceeding. Certainly, the essentially unsupported and unexplained allusions in Joint Intervenors’ reply pleading, see Joint Intervenors Reply at 12, and by Joint Intervenors’ counsel as part of the reply during the oral argument, see Tr. at 22-23, to such factors as the hot, humid nature of the Georgia climate, salinity, and human factors, are

¹⁶ In instances when a reopening motion is untimely, the section 3.326(a)(1) “exceptionally grave” circumstances test supplants the “significant” issue standard under section 2.326(a)(2). See Seabrook, ALAB-886, 27 NRC at 78.

wholly insufficient in that regard. Thus, this additional prong of the reopening standard is unfulfilled as well.

Finally, as is also noted in section II.B.2.a, there is a strict procedural requirement that a reopening pleading must be accompanied by an affidavit that “separately” addresses each of the paragraph (a) provisions of section 2.326 and provides “a specific explanation of why it has been met.” 10 C.F.R. § 2.326(b). Recognizing that their initial petition failed to even mention record reopening or the section 2.326(a) criteria, Joint Intervenors nonetheless urge that if we search through the affidavit attached to their August 12 motion as well as their expert report, we will be able to find something that addresses each of these standards. See Tr. at 35-36. As is the case with unexplained material submitted in support of a contention, see Fansteel, Inc. (Muskogee Okla. Site), CLI-03-13, 58 NRC 195, 204-05 (2003); Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC __, __ (slip op. at 31) (Aug. 5, 2010), we decline this offer to hunt for information that the agency’s procedural rules require be explicitly identified and fully explained.

In sum, Joint Intervenors’ request to admit new contention SAFETY-2 fails to comply with the section 2.326 reopening standards so as to merit further consideration in this proceeding.

3. Nontimely Intervention Petition

Notwithstanding the failure of Joint Intervenors’ motion to fulfill the reopening standards, which is sufficient grounds to reject their new contention admission motion, in the interest of completeness and a more efficient appellate review process, we also discuss their motion’s compliance with the other procedural precepts potentially applicable here, including section 2.309(c)(1)’s standards governing nontimely intervention petitions, section 2.309(f)(2)’s

requirements governing new contentions, and section 2.309(f)(1)'s contention admissibility standards.

a. Standards Governing Nontimely Intervention Petitions

As the Commission recently has noted, in an instance such as this one in which a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue in the case for litigation must submit a new intervention petition in which it addresses, among other things, the standards in section 2.309(c)(1) that govern nontimely intervention petitions. See Schofield Barracks, CLI-10-20, 72 NRC at __ (slip op. at 12); see also 10 C.F.R. § 2.326(d). Although that standard lists eight items that are to be addressed, given our standing ruling above that essentially addresses factors (ii)-(iv) such that they would weigh in favor of Joint Intervenors, see section II.B.1.b, we need consider only factors (i), (v)-(viii), which are as follows:

(i) Good cause, if any, for the failure to file on time;

* * * * *

- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by other parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i), (v)-(viii). Relative to the requisite weighing and balancing of these factors, agency case law establishes that factor (i) is of paramount importance, such that failure to meet this factor enhances considerably the burden of showing that the other factors justify admission of the nontimely petition. See Long Island Lighting Co. (Shoreham Nuclear Power

Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983). Moreover, among the remaining four elements, factors (vii) and (viii) generally have been considered to have the most significance in the balancing process in instances, such as this one, in which there are no other parties or ongoing related proceedings. See id. at 399, 402.

b. Analysis of Nontimely Intervention Petition Standards as Applicable to Joint Intervenors' New Contention Admission Request

DISCUSSION: SNC Answer at 16-18; Staff Answer at 7-12; Joint Intervenors Reply at 7-13; Tr. at 70-72, 89.

RULING: As we noted in section II.B.2.b above, the timeliness analysis under the record reopening standard has implications for the various other procedural precepts that govern a newly-filed contention. Relative to factor (i) under the section 2.309(c)(1) standard for admitting nontimely intervention petitions, we consider our reopening determination regarding the untimeliness of Joint Intervenors' August 2010 motion to be dispositive of the good cause showing here, particularly given that the delay in filing, albeit only three months, comes in the latter portion of this proceeding.¹⁷ See Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). As a consequence, with the lack of "good cause" for their nontimely petition, the other section 2.309(c)(1) factors must weigh heavily in favor of allowing Joint Intervenors' petition/motion into the proceeding.

¹⁷ In a pre-argument order, the Board posed a query to the participants regarding the relationship between the "exceptionally grave" circumstances safety valve under the section 2.326(a)(1) reopening standard and the section 2.309(c)(1) "good cause" standard, in that the former seemingly could supplant/fulfill the timeliness requirements associated with section 2.309(c)(1)(i) and, potentially, section 2.309(f)(2) as well. See Licensing Board Memorandum and Order (Additional Matters Regarding Initial Prehearing Conference/Oral Argument) (Oct. 6, 2010) at 3 (unpublished). Although we need not reach that issue in this instance, as applicant SNC noted, to the degree section 2.309(c)(1)(i) is a "good cause" standard, rather than simply a timeliness standard, it is possible to envision that the significance of the issue being raised by a new contention would be a relevant "good cause" consideration. See Tr. at 70-71.

In that regard,¹⁸ factor (v) provides some support for their motion in that there is no other means to protect Joint Intervenors' interest, assuming that they have actually provided an issue warranting litigation in an individual adjudication. So too, factor (vi) provides some support to the extent that Mr. Gundersen, Joint Intervenors' chief supporting witness, appears to be in a position to assist in developing a sound record regarding their proposed contention, assuming it were to be found admissible for further litigation. Factor (vii) also supports the admission of Joint Intervenors' motion in that there are no other parties to represent their interest. Finally, notwithstanding the recent public disclosure that the staff's final safety evaluation report for this proceeding is now delayed until June 2011, see Letter from David Matthews, Director, Division of New Reactor Licensing, NRC Office of New Reactors, to Joseph A. Miller, SNC Executive Vice President, at 1 (Oct. 29, 2010) (ADAMS Accession No. ML102310362), relative to factor (viii) the admission of Joint Intervenors' motion and the accompanying proposed contention weighs against acceptance as clearly broadening the issues in the contested portion of this proceeding, which heretofore was closed, as well as potentially delaying the proceeding while that matter is fully litigated.

Balancing these various section 2.309(c)(1) elements, we conclude that the lack of good cause under factor (i), in combination with the likelihood under factor (viii) that admission of Joint Intervenors' August 2010 motion and accompanying contention SAFETY-2 will broaden and delay the contested portion of this COL proceeding, weighs against granting Joint Intervenors' nontimely petition to such a degree that they are not negated by factors (v)-(vii) as

¹⁸ In addressing these additional section 2.309(c)(1) factors, we note that Joint Intervenors did not provide any specific discussion of most of these items or the weight they should be given in the balance that is required under this provision, a potentially fatal omission. See Tex. Util. Elec. Co. (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-93-11, 37 NRC 251, 255 (1993).

they weigh in support of admission of the petition. The factors outlined in section 2.309(c)(1) therefore do not support the admission of Joint Intervenors' request to admit a new contention.

4. Admissibility of New Contention

In their initial August 2010 filing, Joint Intervenors addressed exclusively the question whether proposed contention SAFETY-2 meets the new contention admission standards of 10 C.F.R. § 2.309(f)(2). Because the contested portion of this proceeding previously was terminated, it is not apparent that this provision applies since their request is, in actuality, a new petition to which the reopening and nontimely filing standards of sections 2.326 and 2.309(c)(1) apply. Nonetheless, for the sake of completeness, we analyze the section 2.309(f)(2) standard as well.

a. Standards Governing New Contention Admission Requests

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

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available;
- and
- (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In light of its requirements that any new contention be based on material information that was not previously available, the timeliness determination required under this provision and the section 2.326(a) reopening standard can be closely equated. See Vt. Yankee, LBP-10-19, 72 NRC at __ (slip op. at 21).

b. Analysis of New Contention Admission Standards as Applicable to Joint Intervenors' New Contention Admission Request

DISCUSSION: Motion for New Contention at 6-7; SNC Answer at 18; Staff Answer at 9 n.8, 12-13; Joint Intervenors Reply at 7-13.

RULING: Given the discussion in section II.B.2.b above regarding Joint Intervenors' failure to fulfill the record reopening timeliness standard, the failure of Joint Intervenors' motion to admit a new contention to fulfill the test of timeliness that section 2.309(f)(2) demands is equally apparent. As was the case there, Joint Intervenors' failure to proffer a new contention in this adjudicatory proceeding in a timely manner after the April 2010 FIA report was completed and given to the ACRS establishes that Joint Intervenors' motion cannot be considered timely in accord with paragraph (iii) of section 2.309(f)(2). As a consequence, the new contention admission provisions of section 2.309(f)(2) interpose a bar to the admission of new contention SAFETY-2 as well.

5. Admissibility of Contention SAFETY-2

a. Standards Governing Contention Admissibility

Section 2.309(f)(1) of the Commission's rules of practice specifies the requirements for admitting contentions. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of the basis of the contention; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; (4) a demonstration that the issue raised in the contention is within the scope of the proceeding; (5) a showing that the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; and (6) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in

the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f)(1)(i)-(vi). Failure to comply with any of these requirements is grounds for dismissing a contention. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999) (citing Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 143, 155-56 (1991)).

In addition, of particular relevance here is the precept that 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. See 10 C.F.R. § 2.335(a); Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85, 89 (1974). 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.¹⁹ The same is true relative to a contention that challenges applicable statutory requirements or the basic structure of the agency's regulatory process. See, e.g., Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). 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. See id. at 20-21 & n.33.

¹⁹ See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159 (2001); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 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).

b. Analysis of Contention Admissibility Standards as Applicable to Contention SAFETY-2

SAFETY-2 (Adequacy of Containment/Coating Inspection Program)

CONTENTION: SNC's COLA fails to demonstrate that VEGP Units 3 and 4 can be operated safely because the containment and containment-coating inspection regime proposed in the FSAR, see COLA at pp.6.1-1 – 6.1-4, fails to provide assurance against corrosion-caused penetrations of the containment that would lead, in the event of an accident, to leakage to the environment of radioactive materials in excess of regulatory requirements.

DISCUSSION: Motion for New Contention at 4-6; SNC Answer at 6-10; Staff Answer at 15-22; Tr. at 23-27, 38-43, 75-84, 86-97, 104-08, 114-16.

RULING: Proposed contention SAFETY-2 amounts to no more than an improper challenge to the AP1000 standard design and NRC inspection-related regulations as well as a redundant affirmation of established maintenance methodology. Accordingly, the Board denies the admission of proposed contention SAFETY-2.

As supported principally by an affidavit from Mr. Gundersen and the April 2010 FAI report,²⁰ proposed contention SAFETY-2 sets forth two allegations. First, Joint Intervenors

²⁰ Following the October 19, 2010 oral argument, in support of their contention Joint Intervenors also sought to offer a pleading entitled "Additional Authorities." See Additional Authorities (In Support of Oral Argument) (Nov. 1, 2010) [hereinafter Additional Authorities]. The staff and SNC filed responses to this pleading, the latter in the form of a motion to strike, see NRC Staff's Answer to Petitioners' "Additional Authorities" (Nov. 5, 2010); [SNC] Motion to Strike the Filing Entitled "Additional Authorities," or, in the Alternative, [SNC] Response to Movants' Filing Entitled "Additional Authorities" (Nov. 8, 2010), to which the staff and Joint Intervenors filed responses, see NRC Staff's Answer to Applicant's Motion to Strike and Notice of Additional Authority (Nov. 15, 2010); Response to SNC and Staff Motions to Strike Additional Authorities (Nov. 15, 2010).

Generally, an additional authorities filing would be a submission that is the functional equivalent of a letter supplementing authorities, such as is permitted under Federal Rule of Appellate Procedure 28(j). In contrast to SNC's November 8, 2010 additional authorities submission, see Letter from M. Stanford Blanton, SNC Counsel, to Licensing Board (Nov. 8,

(continued...)

allege that the AP1000 annular containment design creates an undue risk of through-wall containment defects that increases the likelihood of leaking radioactive material in the event of an accident. In addition, Joint Intervenors assert that the NRC inspection program applicable to the Units 3 and 4 containments and the associated containment coating regime are inadequate to protect against AP1000 containment defects.

i. Contention SAFETY-2 as a Challenge to the AP1000 Standard Design

It is well-established that a licensing proceeding is not the proper forum for challenging a standard reactor plant design. Rather, issues concerning a standard design, reviewed as part of a design certification application, are resolved in the design certification rulemaking and not in a site-specific COLA proceeding.²¹ See 10 C.F.R. § 52.63(a)(5) (“[I]n making the findings required for issuance of a [COL] . . . the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule.”); Progress

²⁰(...continued)

2010), Joint Intervenors’ filing falls short because it does not cite to any legal “authorities,” see Black’s Law Dictionary 153 (9th ed. 2009) (“authority” defined as “[a] legal writing taken as definitive or decisive; esp., a judicial or administrative decision cited as a precedent,” or “[a] source, such as a statute, case, or treatise, cited in support of a legal argument”). Authorities thus may be binding, adverse, or merely persuasive, but all authorities must possess some legal and precedential/persuasive value.

In their November 1 filing, Joint Intervenors do not cite to any additional “authorities,” at least as that term is generally defined in legal parlance. Instead, they seek to provide additional material, specifically, cites to three documents or events, in support of their position that contention SAFETY-2 is admissible. See Additional Authorities at 1-2 (discovery of containment defects at Turkey Point 3; comments to ACRS regarding inspectability of containment liners in operating plants; statements regarding the alleged containment leak rate compared to the design basis containment leak rate). Because none of Joint Intervenors’ cited authorities possess legal and precedential/persuasive value, their pleading does not constitute a supplemental authorities submission and so is essentially irrelevant to this proceeding. As such, SNC’s motion to strike is moot.

²¹ The Commission has similarly bound itself, generally refusing to modify, rescind, or impose new requirements on certification information, unless through rulemaking. See 10 C.F.R. § 52.63(a)(1).

Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-08-15, 68 NRC 1, 4 (2008); see also 10 C.F.R. § 2.335(a); Tenn. Valley Auth. (Bellefonte Nuclear Power Plant, Units 3 & 4), LBP-08-16, 68 NRC 361, 397 (2008).

In proposed contention SAFETY-2, Joint Intervenors object to several features of the AP1000 standard design containment system (CNS) and passive containment cooling system (PCS). Joint Intervenors maintain, however, that proposed contention SAFETY-2 does not run afoul of the general precept that a standard design cannot be challenged in an individual adjudication because “the design of the AP1000 presents special risks of containment corrosion and coating failure.” Motion for New Contention at 4; see also Tr. 27-28, 38-39. Specifically, Joint Intervenors claim that the unique design of the AP1000 passive cooling system creates an annulus between the containment vessel and surrounding shield building that is “specifically designed” to waft air or gases outward based on natural circulation, i.e., the so-called “chimney effect.” Motion for New Contention, exh. 1, at 3-4, 6 (Declaration of Arnold Gundersen Supporting [BREDL’s] New Contention Regarding AP1000 Containment Integrity on the Vogtle Nuclear Power Plant Units 3 and 4 (Aug. 13, 2010)) [hereinafter Gundersen Declaration]. Joint Intervenors claim, however, that the presence of the annulus also exposes a portion of the containment vessel outer surface to environmentally-assisted degradation. While acknowledging the NRC has observed similar degradation in operating plants, Joint Intervenors maintain that degradation of the AP1000 design may be more difficult to inspect given the annular geometry.²² See Gundersen Declaration at 4-5, 6; Motion for New Contention, exh. 3, at 1-2 (Post Accident AP1000 Containment Leakage, An Unreviewed Safety Issue (Apr. 21, 2010)) [hereinafter FAI Report]; Tr. at 25-27.

²² As a result of these AP1000 standard design features, Joint Intervenors claim that SNC’s COLA does not satisfy General Design Criterion 53, which sets forth requirements on the design of a reactor containment. See Motion for New Contention at 5.

In part, Joint Intervenors are correct. SNC's COLA incorporates an annulus around the containment vessel as well as naturally circulating air flow within the annulus. But the AP1000 DCD²³ discusses these features extensively and identifies them as having been developed for their safety-related benefits. See Westinghouse Electric Company LLC, AP1000 Design Control Document, Tier 2 Material, at 1.2-15 (rev. 17 Sept. 22, 2008) ("The containment vessel and the passive containment cooling system are designed to remove sufficient energy from the containment to prevent the containment from exceeding its design pressure following postulated design basis accidents.") (ADAMS Accession No. ML083230208) [hereinafter AP1000 Rev. 17 DCD]; id. Tier 1 Material, at 2.2.2-2 ("The PCS performs the following safety-related function[]: . . . [t]he PCS provides air flow over the outside of the containment vessel by a natural circulation air flow path from the air inlets to the air discharge structure.") (ADAMS Accession No. ML083230175). As a consequence, challenging these features of the AP1000 standard design is a matter for a design certification rulemaking, see 10 C.F.R. § 52.63(a)(1), not a COLA proceeding, see id. § 52.63(a)(5); see also Shearon Harris, CLI-08-15, 68 NRC at 4.²⁴ A petitioner wishing to raise an issue suited for a design certification rulemaking may pursue either seeking to amend the final design certification rule pursuant to section 52.63(a)(1) or

²³ The design features that Joint Intervenors challenge have been part of the AP1000 standard design since at least revision 15, which the Commission adopted as a certified design. See Tr. at 87.

²⁴ To the degree the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of this proceeding, cf. Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000) (concluding, per 10 C.F.R. §§ 54.21(a), (c), 54.4, that the scope of license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses), Joint Intervenors' challenge here also would be inadmissible under section 2.309(f)(1)(iii).

commenting on a proposed design certification rule during the public comment period pursuant to section 52.51(a).²⁵

ii. Contention SAFETY-2 as a Challenge to NRC Inspection Regulations

In proposed contention SAFETY-2, Joint Intervenors also challenge the inspection and maintenance regime relating to the AP1000 containment vessel. Joint Intervenors claim that “the design of the AP1000 presents special risks of containment corrosion and coating failure, thus requiring that each plant receive special, intensive inspections that address the special circumstances faced by every plant.”²⁶ Motion for New Contention at 4-5; see Tr. at 31-32, 42. In particular, Joint Intervenors challenge the sufficiency of American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code section XI for inservice inspections of containment surfaces as they apply relative to the AP1000 containment corrosion matter about which they are concerned. According to Joint Intervenors, reliance on the ASME Boiler and Pressure Vessel Code section XI for inservice inspections of containment surfaces would, in the event of an accident, lead to an unacceptably high risk of leaking radioactive materials in

²⁵ We would add that the burden on Joint Intervenors to gain admission of a contention in this proceeding is no different because the standard AP1000 design to which they object is being updated. Currently, the latest revision (revision 3) of SNC’s COLA for Vogtle Units 3 and 4 references revision 17 of the AP1000 DCD. See [SNC], Vogtle Elec. Generating Plant, Units 3 & 4, COL[A], pt. 2, Final Safety Analysis Report at 1.1-1 (rev. 3 Aug. 6, 2010) (ADAMS Accession No. ML102220376) [hereinafter COLA]. But revision 17 of the AP1000 DCD is under review by the staff and therefore has not been incorporated into the adopted AP1000 DCD. Thus, in accord with the Commission’s Shearon Harris decision, were the Board to find proposed contention SAFETY-2 “otherwise admissible,” the Board could “refer [SAFETY-2] to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance.” See Shearon Harris, CLI-08-15, 68 NRC at 4 (quoting Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)). For the reasons explained in this section, however, the Board, does not find proposed contention SAFETY-2 otherwise admissible.

²⁶ In addition to the inspections referenced in the DCD and the COLA, Joint Intervenors claim that perhaps “robotic inspections of the interior of the containment[]” should be required as well. Motion for New Contention at 5.

excess of the dose requirement in 10 C.F.R. § 52.79(a)(1)(B). See Motion for New Contention at 5; Gundersen Declaration at 8-9.

In this regard, Joint Intervenors argue that inservice inspections of an AP1000 containment vessel per ASME Boiler & Pressure Vessel Code section XI are inadequate. Joint Intervenors emphasize the history of containment liner degradations in operating plants, see Gundersen Declaration at 4-5, and conclude that this history is directly relevant to the proposed Vogtle AP1000 units, see id. at 5-6; FAI Report at 4-8, 17; Tr. at 116. According to Joint Intervenors, the “common element” in every case of containment degradation has been reliance on ASME inspection requirements. Gundersen Declaration at 5 (“use of ASME inspections to monitor containment integrity is a wholly inadequate methodology”); id. at 8 (“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”).

Joint Intervenors, however, are precluded from challenging ASME inspection requirements in this proceeding because NRC regulations directly incorporate ASME inspection requirements by reference. See 10 C.F.R. § 2.335(a); Peach Bottom, ALAB-216, 8 AEC at 20; Tr. at 64. NRC regulations dictate that a COLA include, inter alia, a description of the programs, and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code in accordance with 10 C.F.R. § 50.55a. See 10 C.F.R. § 52.79(a)(11). In turn, section 50.55a requires that ASME Code Class MC pressure retaining components, of which the containment vessel is one,²⁷ meet

²⁷ The containment vessel is identified as an ASME Code Class MC component in both the inservice inspection subsection of section 50.55a as well as the inspection requirements subsection of the AP1000 DCD. See 10 C.F.R. § 50.55a(g)(4)(v)(A); AP1000 Rev. 17 DCD, Tier 2 Material, at 3.2-21.

the requirements of section XI of the ASME Boiler and Pressure Vessel Code, incorporated by reference in section 50.55a(b). See id. § 50.55a(g)(4). Additionally, the AP1000 DCD expressly requires that the containment vessel be subject to inservice inspections in accordance with ASME Code, section XI, subsection IWE. See AP1000 Rev. 17 DCD, Tier 2 Material, at 3.2-12 (ADAMS Accession No. ML083230299). Therefore, to the extent that proposed contention SAFETY-2 challenges the adequacy of ASME inspection requirements,²⁸ the contention is inadmissible as a challenge to NRC regulations.²⁹

²⁸ At the October 19 oral argument, the Board identified a quandary pertaining to the admissibility of COL inspection-related contentions. See Tr. 78-81, 88-96, 105, 114-15. Specifically, the Board questioned how a petitioner could submit an admissible contention regarding a COLA inspection plan if, as SNC seemed to assert, an inspection plan could be shielded from challenge simply by including a bare-bones description pursuant to section 52.79(a)'s COLA requirements along with a statement that the inspection plan will comply with all pertinent NRC regulations. See Tr. at 80-81, 90. In response to Board queries about whether a petitioner could ever frame an admissible contention that challenged a COLA description of an inspection plan without necessarily challenging the referenced standard plant design or NRC regulations, the staff conceded such a contention could be articulated (even though Joint Intervenors had not done so in this proceeding). See Tr. at 105. SNC argued, however, that in compliance with Commission guidance, inspection plans are subject only to operational oversight through the NRC's inspection and enforcement programs and are not subject to adjudicatory scrutiny in a licensing proceeding, see Tr. at 78-81.

Although the Board decides the admissibility of proposed contention SAFETY-2 on other grounds, it is not apparent to us how SNC's argument accounts for section 52.79(a) of the Commission rules, which identifies numerous requirements for a COLA, including the need for the application to include a description of inservice inspections pursuant to section 52.79(a)(11) (citing section 50.55a) and a description of the program, and its implementation, for monitoring the effectiveness of maintenance pursuant to section 52.79(a)(15) (citing section 50.65), see 10 C.F.R. § 52.79(a)(11), (15), as well as the general proposition that under AEA section 189a, 42 U.S.C. § 2239(a), issues material to the agency's licensing decision must be subject to adjudicatory challenge, see Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

²⁹ As a secondary matter, Joint Intervenors also argue that applying and monitoring protective coatings per American Society for Testing and Materials (ASTM) standards is inadequate to address their containment corrosion concern because "[t]hese policies have already failed in the past." Gundersen Declaration at 9. As with their challenge to the ASME inservice inspection requirements discussed above, Joint Intervenors cite several instances of degraded containment coatings at operating plants, see id. at 4-5, and argue that this history is
(continued...)

III. CONCLUSION

The contested portion of this COL proceeding having been terminated, in submitting contention SAFETY-2, Joint Intervenors faced several not insubstantial hurdles in seeking to have the proceeding revived and a new contention regarding the adequacy of the AP1000 containment design and coating regime accepted for litigation. In addition to the provisions of the agency's rules under 10 C.F.R. §§ 2.326, 2.309(c)(1), (f)(2), governing, respectively, reopening a closed record and the admission of nontimely hearing petitions and new

²⁹(...continued)

directly relevant to the proposed Vogtle AP1000 units, see id. at 5-6; FAI Report at 4-8, 17; Tr. at 116. Joint Intervenors then conclude, albeit without providing any explanation or theory as to why, that the presence of coating defects on some containments subject to ASTM standards indicates that ASTM coating standards are inadequate generally. See Gundersen Declaration at 6, 9.

Joint Intervenors' ASTM coating standards concern appears to hinge on what Joint Intervenors state is a purported inability of the ASTM standards "to prevent incipient rust," Gundersen Declaration at 9, or to mitigate even "potential pitting," FAI Report at 15. In other words, Joint Intervenors argue that the ASTM coating standards fail because there is a lack of assurance that no coating defect will develop. This, however, does not account for the fact that SNC's COLA, in conjunction with the AP1000 certified design that it adopts, recognizes the potential for coating and containment degradation and sets forth numerous precautionary measures in keeping with established containment coating maintenance methodology. See AP1000 Rev. 17 DCD, Tier 2 Material, at 6.1-4, -5 ("The AP1000 design considers the function of the coatings, their potential failure modes, and their requirements for maintenance.") (ADAMS Accession No. ML083230331). Applying and maintaining a protective coating system in accordance with ASTM standards is but one precautionary measure, see COLA at 6.1-1, -2, with other measures including establishing an inservice inspection plan for the containment vessel, see AP1000 Rev. 17 DCD, Tier 2 Material, at 3.2-12; setting an inspection schedule, see id. at 6.1-9; establishing an inspection technique for the coating, see id.; designing hatch access to the containment outer surface, see id. at 3.8-2 (ADAMS Accession No. ML083230305); designing an environmental seal between the middle and upper annulus, see id. at 3.8-38, -39; designing an environmental seal at the concrete and containment vessel junction, see id. at 3.8-15; increasing vessel wall thickness for corrosion-related thinning, see id. at 3.8-15; and generally monitoring the effectiveness of maintenance of the containment vessel outer-wall, see 10 C.F.R. § 50.65. As a consequence, because this ASTM standards-based concern fails to mount a specific challenge to the containment coating application and maintenance requirements that would be applicable to the proposed Vogtle units, it fails to present a genuine dispute with SNC's COLA so as to warrant contention SAFETY-2's admission into this proceeding. See 10 C.F.R. § 2.309(f)(1)(vi).

contentions, Joint Intervenors had to provide a showing that the contention fulfilled the admissibility requirements of section 2.309(f)(1). Joint Intervenors were able to establish their standing to intervene as of right. They failed, however, with respect to the reopening, nontimely petition, and new contention standards principally because they did not timely submit their new contention for consideration in the adjudicatory process, preferring to provide the report upon which they now place principal reliance as support for their contention to the ACRS for review and action. Additionally, their proffered contention is not admissible in this proceeding because it improperly seeks to raise a challenge to aspects of the AP1000 standard design and NRC regulations regarding ASME inspections.

For the foregoing reasons, it is this thirtieth day of November 2010, ORDERED, that

1. Joint Intervenors' September 22, 2010 motion for leave to file their reply pleading out of time is granted.

2. Joint Intervenors' August 12, 2010 motion to admit new contention SAFETY-2 is denied.

3. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this memorandum and order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD

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ADMINISTRATIVE JUDGE

/RA/

James F. Jackson
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 30, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
)
SOUTHERN NUCLEAR OPERATING COMPANY) Docket Nos. 52-025 and 52-026-COL
) ASLBP No. 10-903-01-COL-BD02
(Vogtle))
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON REQUEST TO ADMIT NEW CONTENTION) (LBP-10-21) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-025 and 52-026-COL
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MEMORANDUM AND ORDER (RULING ON REQUEST TO ADMIT NEW CONTENTION)
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Dated at Rockville, Maryland
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