

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SOUTHERN NUCLEAR OPERATING CO.)
) Docket Nos. 52-025-COL and 52-026-COL
(Vogtle Electric Generating Plant,)
Units 3 and 4))

NRC STAFF BRIEF IN OPPOSITION TO PETITIONERS'
APPEAL AND REQUEST FOR ORAL ARGUMENT

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APPEAL AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the Nuclear Regulatory Commission (Staff) hereby files a brief in opposition to the “Notice of Appeal, Request for Oral Argument and Brief Supporting Notice of Appeal by Joint Intervenors,” filed on December 9, 2010, by the Blue Ridge Environmental Defense League, Georgia Women’s Action for New Directions, and the Center for a Sustainable Coast (“Petitioners”), regarding the Atomic Safety and Licensing Board’s (Board’s) decision, “Ruling on Request to Admit New Contention,” November 30, 2010. See *Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, LBP-10-21, 71 NRC ____ (Nov. 30, 2010) (slip op.). In LBP-10-21, the Board denied the Petitioners’ request to admit a new contention and terminated the proceeding. For the reasons set forth herein, the Board’s ruling regarding the proposed contention and its termination of the proceeding should be upheld.

STATEMENT OF THE CASE

This proceeding concerns the application filed by Southern Nuclear Operating Company (“Southern” or “Applicant”) and several co-applicants for a combined license (COL) for Vogtle Electric Generating Plant Units 3 and 4. Southern Nuclear Operating Company; Acceptance for Docketing of an Application for Combined License for Vogtle Electric Generating Plant Units 3

and 4, 73 Fed. Reg. 33,118 (June 11, 2008). On September 16, 2008, the NRC published a notice of hearing on the Application. *Southern Nuclear Operating Company; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for Vogtle Electric Generating Plants Units 3 and 4*, 73 Fed. Reg. 53,446 (Sept. 16, 2008). Pursuant to that notice, on November 17, 2008, several organizations filed a joint petition to intervene. *Petition for Intervention* (Nov. 17, 2008).¹

On March 5, 2009, the Atomic Safety and Licensing Board (ASLB) designated to rule on the petition granted the petition and admitted one contention, designated Safety-1, characterizing that contention as a contention of omission. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC 139, 160-164 (2009). The ASLB granted a request to amend the contention on January 8, 2010, and established a schedule for the filing of summary disposition motions. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), (LBP Jan. 8, 2010) (unpublished order); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-01, 71 NRC ___ (Jan. 8, 2010) (slip op.). On May 19, 2010, the ASLB granted the Applicant's motion for summary disposition, thereby resolving all the contested issues and terminating the contested portion of the proceeding. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 72 NRC ___ (May 19, 2010) (slip op. at 17).

On August 12, 2010, three organizations, referring to themselves as Joint Intervenors ("Petitioners"),² submitted a new petition before the former ASLB presiding over the contested proceeding, seeking admission of a new contention designated Safety-2. See *Petition*. On August 17, 2010, the members of the former ASLB issued a memorandum noting that the former

¹ These organizations were Atlanta Women's Action for New Directions, Blue Ridge Environmental Defense League, Center for a Sustainable Coast, Savannah Riverkeeper, and Southern Alliance for Clean Energy.

² These organizations are the Blue Ridge Environmental Defense League (BREDL), Center for a Sustainable Coast (CSC), and Georgia Women's Action for New Directions (Georgia WAND).

Board lacked jurisdiction and referring the petition to the Commission. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), (LBP Aug. 17, 2010) (unpublished order) (ML1022904983) (Referring Request to Admit New Contention to the Commission). On August 25, 2010, the Secretary of the Commission issued an order referring the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action consistent with 10 C.F.R. § 2.309(a) and (c). *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), at 1 (CLI Aug. 27, 2010) (unpublished order) (ML1023713320). On August 27, 2010, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel appointed a Licensing Board.³ Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 53,985 (Sept. 2, 2010); *Southern Nuclear Operating*

³ On August 30, 2010, this newly-appointed Board issued a memorandum and order establishing several administrative and scheduling directives for the new proceeding. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), (LBP Aug. 30, 2010) (unpublished order) (Setting Balance of Initial Briefing Schedule and Oral Argument). The Applicant had already filed its Answer to the Petition. SNC Answer to Proposed New Contention by Certain Former Joint Intervenors (Aug. 23, 2010) [hereinafter SNC Answer]. The Staff filed its Answer on September 2, 2010. NRC Staff's Answer to Petition (Sept. 2, 2010) [hereinafter Staff Answer]. On September 10, 2010, the date upon which Petitioners were due to submit their reply to the SNC and Staff answers, the attorney who previously had entered an appearance on behalf of Petitioners withdrew from this proceeding. See Notice of Withdrawal for James B. Dougherty, Esq. (Sept. 10, 2010). On that same date, 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), although neither BREDL, nor CSC, nor Georgia WAND filed a reply to the SNC and Staff answers on that due date. See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), at 2 (LBP Sept. 13, 2010) (unpublished order) (Canceling Scheduled Oral Argument; Setting Schedule for Further Submission by Joint Intervenors). Given the circumstances, the Board canceled the September 17 argument and set a deadline of September 22, 2010, for Petitioners 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. *Id.* at 3.

On September 22, 2010, Petitioners 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). The Board granted Petitioners' motion for leave to file out of time, finding that the unexpected withdrawal of Petitioners' former attorney, which left them without a responsive pleading on the day that pleading was due or any opportunity to file a timely motion requesting an extension of the filing deadline, presented the type of "unavoidable and extreme circumstances" that supported granting the motion. *Vogtle*, LBP-10-21, 71 NRC ____ (slip op. at 13-14).

Co. (Vogle Electric Generating Plant, Units 3 and 4), (LBP Aug. 30, 2010) (unpublished order) (Setting Balance of Initial Briefing Schedule and Oral Argument).

Following the submission of answers to the new petition from SNC and the Staff and a reply from the Petitioners, the Board heard oral argument on standing and contention admissibility on October 19, 2010.

On November 30, 2010, the Board issued a Memorandum and Order, "Ruling on Request to Admit New Contention," in which it found that Contention Safety-2 was inadmissible under the standards of 10 C.F.R. § 2.309(f)(1) and (c), as well as under 10 C.F.R. § 2.326, and it terminated the proceeding. *Vogle*, LBP-10-21, 71 NRC ____ (slip op. at 2, 40-41). On December 9, 2010, Petitioners timely filed their "Notice of Appeal, Request for Oral Argument and Brief Supporting Notice of Appeal by Joint Intervenors" (Appeal), appealing the Board's decision in LBP-10-21.

STATEMENT OF THE ISSUES

The issue presented is whether the Board erred in finding the contention inadmissible and therefore denying the petition. Upon finding that the petition failed to comply with the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and (c), as well as the standards of 10 C.F.R. § 2.326 for reopening a closed record, the Board terminated the proceeding. *Vogle*, LBP-10-21, 71 NRC ____ (slip op. at 2, 40-41). The Board's ruling on contention admissibility should be reversed only if it committed an error of law or abuse of discretion in rejecting the proffered contention. See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

LEGAL STANDARDS

I. Legal Standards for Review of a Board Order Denying a Petition to Intervene

When reviewing licensing board decisions regarding contention admissibility, the Commission will give substantial deference to the Boards' determinations on threshold issues and will regularly affirm Board decisions on issues of admissibility of contentions where the

appeal fails to point to an error of law or abuse of discretion. See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006)).

A petitioner appealing a Board's denial of intervention "bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)). The Commission applied this principle in *Millstone* to reject on appeal "general arguments" that failed to "come to grips with the Board's reasons for rejecting" the contention. *Millstone*, CLI-04-36, 60 NRC at 639.

DISCUSSION

I. The Board Properly Found That Contention Safety-2 Was Not Admissible.

The Board did not commit legal error or an abuse of discretion in finding Contention Safety-2 inadmissible. Petitioners' Contention Safety-2 is as follows:

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.

Petition at 4. The Board rejected Contention Safety-2 because Petitioners failed to satisfy the applicable standards for reopening the record, nontimely intervention petitions, and contention admissibility. *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 41). Furthermore, the Board found that the contention constituted an impermissible attack on the AP1000 design certification rulemaking and NRC regulations. *Id.* at 34-40. Thus, there are multiple bases for the Board's rejection of Contention Safety-2, and each of these bases constitutes an independent basis for

upholding the Board's decision to deny the petition. On appeal, Petitioners assert that the Board erred in its analysis applying the standards for reopening the record, nontimely intervention petitions, and contention admissibility. Appeal at 4-16. For the reasons set forth below, Petitioners' arguments must be rejected, as they do not identify legal error or an abuse of discretion in the Board's reasoning, and the Board's determination regarding Contention Safety-2 should be upheld.

A. Petitioners' New Arguments on Appeal Are Impermissible

As a threshold matter, Petitioners have raised several new arguments on appeal that have not been raised in prior pleadings or during oral argument, asserting that the Vogtle COL Application violates various provisions of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* Appeal at 4-6. It is well established that an intervenor must raise an issue before the Presiding Officer (here, the Board) or the intervenor will be precluded from supplementing the record before the Commission. *Hydro Resources, Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-00-08, 51 NRC 227, 243 (2000); *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 421 (2006). An appeal may only be based on matters and arguments raised below. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 281 (1987). Accordingly, these arguments do not constitute a proper basis for appeal.

First, Petitioners assert that the "structures, systems and components" of the proposed reactors are not adequate to prevent the accidental release of radioactive materials. Petitioners claim that this violates the provision in 10 C.F.R. § 50.34(a)(4) that a construction permit application for a nuclear power plant include an "analysis and evaluation of the design and performance of structures, systems, and components of the facility with the objective of

assessing the risk to public health and safety.”⁴ Appeal at 4-5. According to Petitioners, this violates the AEA’s primary mandate to prohibit the Commission from issuing a license to operate a nuclear power plant if it would be “inimical to the common defense and security or to the health and safety of the public.” Appeal at 4 (quoting 42 U.S.C. § 2133(d)). This argument based on the AEA and section 50.34 was not raised before the Board, and it must be rejected on appeal. See, e.g., *Hydro Resources*, CLI-06-29, 64 NRC at 421. Alternatively, to the extent this assertion is intended to recast an argument that the Petitioners did make before the Board - that in the event of an accidental containment leakage, radiation would be directed “unfiltered into the environment” because the AP1000 passive cooling system created an “annulus” between the containment vessel and surrounding shield building designed to “waft air or gases outward based on natural circulation” - that claim was properly rejected by the Board as an impermissible challenge to the AP1000 certified design. *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 35-36 and 36 n.23).

Second, Petitioners claim that the Application violates NEPA because the Applicant ignores the scenario for a release of radioactive materials into the environment as postulated in Contention Safety-2. Appeal at 6. Petitioners also assert that the lack of such an analysis violates 40 C.F.R. § 1502.22(b)(1), a regulation promulgated by the Council on Environmental Quality with respect to consideration of “incomplete or unavailable information” in an agency’s environmental review under NEPA. *Id.* The Petitioners did not previously challenge the applicant’s environmental analysis or even refer to NEPA as a basis for the proposed contention; thus, these arguments must be precluded on appeal. See, e.g., *Hydro Resources*,

⁴ Petitioners state in their Appeal that “releases of radioactive material directly from the environment from a throughwall hole or crack in the Vogtle containment vented into the atmosphere through a chimney effect is approximately 25 times greater than the design leak rate.” Appeal at 5. Petitioners made a substantially similar statement in a filing entitled “Additional Authorities” following the October 19, 2010 oral argument, but the Board stated that because that filing had no legal or precedential/persuasive value, it was “essentially irrelevant” to this proceeding. See *Additional Authorities (In Support of Oral Argument)* (Nov. 1, 2010); *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 33-34 n.20).

Inc., CLI-06-29, 64 NRC at 421. In any event, the Appeal does not explain how these regulatory provisions related to an environmental review are relevant to the safety deficiencies alleged in the initial contention. Moreover, to the extent these environmental claims are rooted in an attack on the adequacy of the AP1000 design, they merely repackage the assertions properly rejected by the Board as attacks on the certified design that are thus outside the scope of the COL proceeding. See *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 35-36 and 36 n.23).

Thus, Petitioners' new assertions that the COLA fails to comply with the AEA and NEPA should be precluded. Additionally, as these new claims ultimately rely on challenges to the AP1000 design, the underpinnings of these arguments were properly rejected by the Board as impermissibly challenging the design certification rulemaking. For both reasons, Petitioners fail to show that the Board committed legal error or an abuse of discretion.

B. The Board Properly Found Contention Safety-2 Inadmissible Under § 2.309(f)(1)

Petitioners challenge the Board's holding that Contention Safety-2 fails to meet the contention admissibility standards, in particular 10 C.F.R. § 2.309(f)(1)(iii),⁵ and is essentially an attack on NRC regulations. Appeal at 8, 13; *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 36 n.24,

⁵ These standards are as follows:

“(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

...

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

...

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief...”

10 C.F.R. § 2.309(f)(1)(iii) and (vi).

39-40 n. 29). The Board noted that Petitioners' disputes with the inspection programs at the proposed site were actually attacks on the ASME Boiler & Pressure Vessel Code ("ASME Code") section XI. *Id.* at 38. The Board held that Petitioners were precluded from challenging the ASME inspection requirements in this proceeding because NRC regulations directly incorporate ASME inspection requirements by reference. *Id.* For instance, the Board noted that section 50.55a requires that "ASME Code Class MC pressure retaining components, of which the containment vessel is one, meet the requirements of section XI of the ASME Code, incorporated by reference in section 50.55a(b)." *Id.* at 38-39. Thus, the Board held that these types of challenges to NRC regulations were inadmissible under section 2.309(f)(1)(iii). *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 36 n.24).⁶

Petitioners argue that the Board ignored the "specific analysis [conducted] by Mr. Gundersen" offered to support their contention, pointing out that "inspection and maintenance procedures are clearly within the province of the license application" as under 10 C.F.R. § 52.79. Appeal at 8, 13. In an attempt to assert that Contention Safety-2 is an attack on the COLA, not the AP1000 design, they specify a number of issues that are COL-specific, such as "visual inspections at Vogtle" and "field application of protective coatings." *Id.* at 13. However, the Board addressed these arguments directly and found them to be impermissible challenges to NRC regulations incorporating ASME Code requirements. *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 37-39).

Petitioners' arguments on appeal fail to point out any flaw in the Board's reasoning that Contention Safety-2 was an impermissible challenge to NRC regulations.⁷ Accordingly,

⁶ The Board also held that Petitioners' challenge to the ASTM coating standards failed to "mount a specific challenge to the containment coating application and maintenance requirements that would be applicable to the proposed Vogtle units," and as such, failed to present a genuine dispute with SNC's COLA so as to warrant admission of the contention. 10 C.F.R. § 2.309(f)(1)(vi); *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 39-40 n. 29). Petitioners did not directly challenge this specific finding on appeal.

⁷ Petitioners also state that the Board "found in essence" that Contention Safety-2 had merit, as it "pointed directly to flaws in the COLA concerning the Vogtle inspection program and monitoring of maintenance." Appeal at 7 (referencing *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 39n.28). However,

Petitioners have not demonstrated that the Board committed a legal error or an abuse of discretion.

C. The Board Properly Found Contention Safety-2 Untimely

Petitioners also challenge the Board's finding with regard to the timeliness of their submitted contention. The Board ruled that the contention was untimely under the standards of 10 C.F.R. § 2.309(c). *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 29-30). Accordingly, the Board also found that the Petition failed to demonstrate timeliness under the reopening standards of section 2.326, which contains a provision mandating that for motions to reopen which relate to a contention not previously in controversy among the parties, § 2.309(c) must be met.⁸ 10 C.F.R. §§ 2.309(c), 2.326(d); *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 22-30).

Petitioners originally asserted that their contention was timely because they submitted it within the appropriate time frame after they learned about a statement made by the Chair of the Advisory Committee on Reactor Safeguards (ACRS) during a June 25, 2010 meeting concerning AP1000 design certification issues. See *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 23). This statement, they claimed, amounted to new information in the form of a determination that questions regarding containment inspections and coatings fall within the context of the COL licensing proceeding, and not the design certification process. *Id.*

The Board, however, correctly held that regardless of when Petitioners had the information, or the "technical/financial wherewithal" to obtain their analysis, they clearly could have submitted their petition based on the issuance of the April 2010 Fairewinds Associates, Inc. Report ("FAI Report"). *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 23-24). As the Board noted, Petitioners' attempt to assign significance to the ACRS Chairman's purported

Petitioners inaccurately describe the Board's ruling. In the referenced footnote, the Board did not state or imply that the Petitioners' contention had merit; rather, the Board was discussing a hypothetical situation presented during oral argument as to whether a petitioner could ever submit an admissible contention regarding a COLA inspection plan. *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 39 n.28).

⁸ As discussed further below, the Board had ruled that the reopening standards of section 2.326 applied to Petitioners' contention. *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 22).

characterization of that report is irrelevant for purposes of the timeliness of their submission. *Id.* at 24. Petitioners have an “ongoing, independent responsibility to identify and interpose issues into this proceeding on a timely basis.” *Id.* The Board determined that Petitioners could have chosen to submit their petition at the same time they chose to submit the FAI report to the ACRS in April, and their failure to do so until August 2010 made the contention untimely under both the section 2.309(c) and section 2.326(a)(1) standards. *Id.*

On appeal, the Petitioners essentially reiterate their arguments below that “no one could have known” what the opinion of the ACRS members would be prior to their meeting on June 25, 2010 regarding the issues of corrosion, coatings, inspection and maintenance issues raised by Mr. Gundersen. Appeal at 11. Petitioners argue that the timeliness of their petition should thus be based on the publication of the ACRS transcript from the June 25, 2010, meeting, and the subsequent analysis of the program flaws as demonstrated in their expert affidavit.⁹ *Id.* The transcript publication, according to Petitioners, was the last piece of the “puzzle” that was needed to formulate their contention.¹⁰ Appeal at 12-14.

⁹ Petitioners also maintain that “it is impossible to assess the compliance of [the] COLA with safety rules without a complete, certified and reviewed design at the licensing stage.” Appeal at 11n. 5. This appears to be another new argument that Petitioners have not raised before, and thus must be precluded. *Hydro Resources, Inc.*, CLI-00-8, 51 NRC at 243. In any case, the Board correctly noted in its decision that any petitioner wishing to raise an issue better suited for a design certification rulemaking may either seek to amend a final design certification rule pursuant to 10 C.F.R. § 52.63(a)(1) or comment on a proposed design certification rule during the public comment period pursuant to 10 C.F.R. § 52.51(a). *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 36-37). To the extent Petitioners are asserting that it is impermissible for the Vogtle COL to reference the AP1000 design while the AP1000 design certification amendment is under review, Petitioners are essentially challenging an NRC regulation, 10 C.F.R. § 52.55(c), which clearly allows a COL applicant to reference a design certification application. 10 C.F.R. § 52.55(c); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, at 3 (2008); “Conduct of New Reactor Licensing Proceedings; Final Policy Statement,” 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (New Reactor Licensing Policy Statement). As the Commission recently noted, “[i]n fact, 10 C.F.R. § 52.55(c) explicitly envisions concurrent proceedings on a design certification rule and a COLA. It specifically permits an applicant to reference a design certification that the Commission has docketed but not granted[.]” *Detroit Edison Co.* (Fermi Unit 3), CLI-09-04, 69 NRC 80, 85 (2009). Such attacks are thus impermissible unless the standards of 10 C.F.R. § 2.335 for waivers are met, and these standards are not met here.

¹⁰ Petitioners also state that NRC Information Notice No. 2010-12, “Containment Lining Corrosion,” which is dated June 18, 2010, demonstrates that “even the NRC Staff had not realized the gravity of the problem and its widespread prevalence throughout the industry until some time after the filing of the new contention.” Appeal at 12. This reference to a generic communication regarding

However, the Board correctly determined that Petitioners could have chosen to submit their petition at the same time they chose to submit the FAI report to the ACRS in April. *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 24). As the Board noted in its decision, all the information necessary to propose a contention on this issue was available at that time. *Id.* at 23-24. Nothing in Petitioners' appeal indicates that the Board was incorrect in this regard. Thus, Petitioners have not demonstrated that the Board committed a legal error or abuse of discretion with regard to the Board's rejection of the contention as untimely, and thus their assertions should be rejected.

D. The Board Properly Found That The Standards For Reopening the Record Were Not Met.

Petitioners challenge the Board's decision regarding their failure to meet the standards set forth in 10 C.F.R. § 2.326 for reopening a closed record.¹¹ Appeal at 9-15. Petitioners

containment liners does not affect the Board's holding that Petitioners could and should have submitted their contention regarding alleged deficiencies in the *Vogtle* application when they submitted the FAI Report to the ACRS in April. *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 23-24). Moreover, Petitioners referred the Information Notice in a filing entitled "Additional Authorities" following the October 19, 2010 oral argument, but the Board stated that because that filing had no legal or precedential/persuasive value, it was "essentially irrelevant" to this proceeding. See *Additional Authorities (In Support of Oral Argument)* (Nov. 1, 2010); *Vogtle*, LBP-10-21, 71 NRC __ (slip op. at 33-34 n.20).

¹¹ The standards for meeting the criteria for reopening a closed record are as follows:

"(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

- (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.

(b) The motion 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. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with

dispute both the “unduly high standard” set forth by the Board for meeting the requirements of section 2.326, as well as the Board’s finding that they failed to meet the individual requirements for reopening the record. *Id.*

Petitioners challenge the Board’s reliance on *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-09-05, 69 NRC 115 (2009), as setting an “unduly high standard for reopening a proceeding.” Appeal at 10. They attempt to differentiate the facts of *Millstone* from those in the present proceeding by asserting that in *Millstone* the petitioners sought to introduce new contentions after the Board had denied their initial petitions and all of their contentions, whereas in the present proceeding a contention had been admitted previously. *Id.* Petitioners fail to explain how this distinction shows that the Board’s reliance on *Millstone* was in error. Contrary to Petitioners’ assertion, the Board was correct in holding that *Millstone* applies to the situation at hand, because in both sets of circumstances, the record closed upon the termination of the contested proceeding, i.e., upon the Board’s disposition of the original contentions. *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 22). The fact that there was previously an admitted contention in this proceeding does not affect the analysis. The Board was correct in applying *Millstone* to the circumstances at hand.

Petitioners also argue that the Board erred in finding that they failed in Contention Safety-2 to present an exceptionally grave issue under section 2.326(a)(1). Appeal at 12, 15.

particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).”

They assert that their affidavit from Arnold Gundersen shows an exceptionally grave issue, claiming the strong possibility of a release of radiation in the event of an accident and the possibility of containment leakage if the inspection programs at the proposed site are not meaningfully evaluated. *Id.* They assert that the Board concluded that procedural matters outweighed all other factors, such as the exceptionally grave issue presented in their contention. *Id.* at 13. Moreover, they argue that their pleading met the other factors of section 2.326 because they presented an expert affidavit (in the form of the affidavit by Mr. Gundersen), which provided the factual and technical bases for the contention and demonstrated that the inspection programs will have a significant impact on public health and safety. Appeal at 14-15. According to Petitioners, had their expert analysis, as well as the ACRS opinions, been available earlier, the Board would have concluded that the COL should not be granted, thus satisfying the requirement in section 2.326(a)(3) that “a materially different result would be or would have been likely had the newly proffered evidence been considered initially.” Appeal at 15.

Petitioners’ arguments were already evaluated and correctly rejected by the Board for failure to meet the standards of section 2.326. *Vogtle*, LBP-10-21, 71 NRC ___ (slip op. at 25-26). In carefully evaluating whether the proposed contention met each of those standards, the Board did not, as Petitioners assert, conclude that procedural matters outweighed the rest of the section 2.326 factors. *Id.* Rather, it found that the information presented by Petitioners was not clearly applicable to containment leakage, and “certainly not compelling enough” to make the Board consider this a matter “exceptionally grave” under section 2.326(a)(1). *Id.* As for meeting 2.326(a)(3), the Board correctly held that nothing in the Gundersen affidavit, other supporting materials, Petitioners’ reply pleading, or statements made by Petitioners during oral argument, provided any information that would suggest that Petitioners’ alleged concern regarding the AP1000 has any particular significance for the proposed units that would merit resolution in this proceeding. *Id.* at 25-26. Nothing in Petitioners’ Appeal demonstrates that the

Board erred in making this finding. The Board also noted that given that the initial petition failed to mention record reopening or the section 2.326(a) criteria, combined with Petitioners' leaving it to the Board to "search through the affidavit...and their expert report" to find information that addresses the relevant criteria, the Petitioners failed to demonstrate how they met the criteria under section 2.326(b). *Id.* at 26.

Although Petitioners repeated arguments previously raised in this proceeding to assert that they meet the reopening standards under section 2.326, these arguments do not "come to grips with" the reasoning supporting the Board's holding that the Petitioners fail to meet those standards. Because they have not demonstrated how the Board committed a legal error or an abuse of discretion, their arguments should be rejected and the Board's determination upheld.¹²

CONCLUSION

The Board rejected Contention Safety-2 because Petitioners failed to satisfy the applicable standards for reopening the record, nontimely intervention petitions, and contention admissibility. Each of these bases constitutes sufficient independent grounds for the Board's rejection of the contention, and Petitioners do not identify any legal errors or abuse of discretion in any of these findings. For this reason, their appeal should be denied and the Board's decision in LBP-10-21 should be upheld.

Respectfully submitted,

/signed (electronically) by/
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Dated at Rockville, Maryland
This 20th day of December, 2010

¹² Petitioners' Appeal includes a request for oral argument before the Commission. As explained above, Petitioners have identified no error or abuse of discretion by the Board. Oral argument on Petitioners' claims is simply not warranted.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
Southern Nuclear Operating Co.) Docket Nos. 52-025 and 52-026
)
(Vogtle Electric Generating Plant,)
Units 3 and 4))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF BRIEF IN OPPOSITION TO PETITIONERS' APPEAL AND REQUEST FOR ORAL ARGUMENT, have been served upon the following persons by Electronic Information Exchange this 20th day of December, 2010:

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