



October 14, 2011

VIA ELECTRONIC INFORMATION EXCHANGE

Chairman Gregory B. Jaczko
Commissioner Kristine L. Svinicki
Commissioner George Apostolakis
Commissioner William D. Magwood, IV
Commissioner William C. Ostendorff

Re: Southern Nuclear Operating Company's Request to Waive the Requirements of 10 C.F.R. § 2.807

Dear Commissioners:

On September 27, 2011, you held the mandatory hearing on the combined licenses ("COL") and limited work authorization ("LWA") for Vogtle Electric Generating Plant Units 3 and 4. During this hearing, Southern Nuclear Operating Company ("Southern") requested the following:

[W]e have requested this Commission to address a policy question relative to the timing of issuing of the limited work authorization bravo and/or the combined licenses as promptly as possible after Commission affirmation of the AP1000 rulemaking. We requested that you consider issuance of the limited work authorization and combined license based on the affirmation of the AP1000 rulemaking, rather than delaying until 30 days after publication of the rule. We will be in a position to implement the rulemaking as soon as it is affirmed.... I respectfully renew our request to the Commission to consider our policy question.

Statement of Joseph ("Buzz") Miller, Executive Vice President for Nuclear Development for Southern and Georgia Power Company, during the Mandatory Hearing for Southern Nuclear Operating Co., et al., Combined Licenses for Vogtle Electric Generating Plant, Units 3 and 4, and Limited Work Authorization, September 27, 2011, at 0:23:19.

This request, while phrased as a "policy question," is actually a request to waive the publication requirements set forth in 10 C.F.R. § 2.807 (and 5 U.S.C. § 533). Because the request was not made in accordance with Nuclear Regulatory Commission ("NRC") regulations governing rule waiver requests, including 10 C.F.R. § 2.335, and because waiver of 10 C.F.R. § 2.807 would not afford the undersigned

reasonable time to prepare for issuance of the COL or LWA, we respectfully ask the Commission deny Southern's request to waive the publication requirements.

The Waiver Request Was Not Made in Accordance with NRC Regulations.

We first became aware of Southern's request to waive the publication requirements of 10 C.F.R. § 2.807 during the mandatory hearing. A mandatory hearing, of course, is not the proper forum to request a waiver of a rule. Rather, the purpose of a mandatory hearing is solely to ensure that the NRC Staff performs an adequate review of the COL application and makes findings with reasonable support in logic and fact. *See e.g.*, North Anna ESP, CLI-05-17, 62 NRC at 39-42. Because members of the public are not allowed to participate in mandatory hearings, requesting a waiver of a rule in this forum is all the more inappropriate.

During the mandatory hearing, we were surprised to learn that this was the second attempt by Southern to request a waiver of the publication rule. In a private letter dated July 20, 2011 (the "Letter"), Southern previously requested that the COL and LWA be issued before publication of the AP1000 design certification.¹ And, we were even more surprised that the Commission did not make this request publically available on the Agencywide Documents and Management System.² The public had no way of knowing a request was made until Mr. Miller referenced it in the mandatory hearing. We have now obtained the Letter upon request to the NRC Staff.

Both of Southern's requests inappropriately attempt to exclude the public from participating in the decision to waive a rule which protects their interests. NRC regulations regarding rule waivers expressly prohibit this approach, and instead permit interested parties to respond to any rule waiver requests. 10 C.F.R § 2.335(b). Before the right to respond even arises, the request itself must adhere to

¹ Letter from S. E. Kuczynski to U.S. Nuclear Regulatory Commission dated June 20, 2011. *See* Attachment A.

² In an email to Diane Curran dated October 13, 2011, a Public Document Room librarian explained, "This document is currently available in ADAMS only to NRC staff. It is marked as non-public, but non-sensitive. I do not know the reason why it is not publicly available in ADAMS. There is currently no date for public release." *See* Attachment B.

10 C.F.R § 2.335, which requires the party seeking the waiver to demonstrate the existence of special circumstances with respect to the subject matter of the proceeding, such that the application of the rule to the proceeding would not serve the purposes for which it was adopted. To make such a demonstration, the party seeking the waiver must 1) petition that the specified rule should not be applied, and 2) submit an affidavit identifying the specific aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted. Southern has made no attempt to follow these requirements.

Waiver of 10 C.F.R. § 2.807 Would Not Afford the Undersigned Reasonable Time to Prepare for Issuance of the COL or LWA.

Even if Southern had followed the proper procedures for rule waiver, its request should be denied. As Southern notes in its Letter, the purpose of the publication requirement is to “afford persons affected a reasonable time to prepare for the effective date of a rule or rules *or to take any other action which the issuance of rules may prompt.*” Letter at 2 (citing Sen. Rep. p. 15; H.R. Rep p. 25 (Sen. Doc. pp. 201, 259)) (emphasis added). Southern argues that because it will voluntarily subject itself to an accelerated effective date and is prepared to come into compliance immediately, this purpose is fulfilled. *Id.* This argument, however, ignores all other parties who will be affected by certification of the AP1000. When the design certification rule becomes effective, a COL and LWA will be issued. The resulting nuclear power plant will certainly affect all persons located near the site. The 30-day publication period is necessary for these individuals to evaluate the rule, to determine whether they wish to appeal it, and if necessary to seek a stay of construction.³

³ Given that the mandatory hearing for the South Carolina Electric & Gas application for AP1000 units at the V.C. Summer site has now taken place, any decision by the Commission concerning the Southern Company request will likely also apply to the status of the SCE&G COL. Thus, an additional set of parties would be negatively impacted if the NRC regulations were by-passed. Those parties would likewise be denied their right to evaluate the rule, to determine whether they wish to appeal it, and if necessary to seek a stay of construction.

We respectfully ask the Commission to deny Southern's request to waive the 30-day publication period required by 10 C.F.R. § 2.807 because it was not made in accordance with NRC procedures for rule waiver as set forth in 10 C.F.R § 2.335, and because waiver of 10 C.F.R. § 2.807 would not afford the undersigned reasonable time to prepare for issuance of the COL or LWA. Because the COL and LWA could be approved in just a few months, we ask for an immediate response to this letter and assurance that the public will not be excluded from any decision making regarding the effective date of the AP1000 design certification rule as it relates to issuance of the COL and LWA.

Regards,

Mindy Goldstein
Counsel for Southern Alliance for Clean Energy, Georgia
Women's Action for New Directions, and Center for a
Sustainable Coast

Stephen E. Kuczynski
Chairman, President and
Chief Executive Officer

**Southern Nuclear
Operating Company, Inc.**
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ATTACHMENT A



JUL 20 2011

Docket Nos.: 52-025
52-026

ND-11-1476
10 CFR 52.80

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
ATTN: Chairman Gregory B. Jaczko
ATTN: Commissioner Kristine L. Svinicki
ATTN: Commissioner George Apostolakis
ATTN: Commissioner William D. Magwood, IV
ATTN: Commissioner William C. Ostendorff
Washington, DC 20555-0001

Southern Nuclear Operating Company
Vogtle Electric Generating Plant Units 3 and 4 Combined License Application
Final Standard Design Certification Rulemaking for LWA-B Request

Dear Commissioners:

By letter dated March 28, 2008, Southern Nuclear Operating Company (SNC) submitted an application for combined licenses (COLs) for proposed Vogtle Electric Generating Plant (VEGP) Units 3 and 4 to the U.S. Nuclear Regulatory Commission (NRC) for two Westinghouse AP1000 reactor plants, in accordance with 10 CFR Part 52. On October 2, 2009, as part of the COL application, SNC submitted a second Limited Work Authorization request (the initial request being that one submitted with the Early Site Permit application) to allow for installation of rebar and "first concrete." As the designated AP1000 Reference COL applicant, SNC has a keen interest in the first-of-a-kind process for issuing the initial COL under 10 CFR Part 52. In that regard, and separate from a complete and thorough safety review, SNC believes the Commission has discretion regarding the timing of the COL issuance as it relates to the design certification rule (DCR) certifying the amendment to the AP1000 design. We request that the Commission exercise its discretion to issue the COL based on the affirmation date of the AP1000 DCR. SNC believes that issuing the COL based upon the DCR affirmation, rather than the DCR effective date, would serve two important policy objectives: (1) ensuring finality of the design certification rule prior to issuance of the license and (2) maximizing efficiency in the licensing process.

SNC believes that issuing the COL as outlined above meets the Commission's 2008 Final Policy Statement on the Conduct of New Reactor Licenses Proceedings, which emphasizes that a COL that references a pending DCR should not be issued until the

DCR is "final." More specifically, SNC submits that the issuance of the Vogtle 3 and 4 COL can follow within 10 days of the Commission's decision on the mandatory hearing for the COL, which, under current Commission processes, would be issued immediately after affirmation of the DCR. Even if the Commission's affirmation vote is conditioned on revisions to the Staff's proposed final rule, the nature of those revisions will be known and the Commission's affirmation that triggers its decision on the mandatory hearing will be of the revised rule. As a result, both the Director of the Office of New Reactors and the Commission will have an adequate basis for finding that the application complies with the DCR at the time it is affirmed.

Relative to the process subsequent to DCD affirmation we offer the following policy considerations. First, the probability of substantive design changes resulting from the Office of Management and Budget's review of the DCR under the Paperwork Reduction Act is so low as to be non-existent. Also, the DCR is an enabling regulation that is implemented voluntarily by COL applicants, not one that imposes obligations on regulated parties without their consent. Congress' intent in requiring that regulations become effective 30 days after publication in the Federal Register is to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt." Sen. Rep. p. 15; H.R. Rep. p. 25 (Sen. Doc. pp. 201, 259). In this case, the parties involved are voluntarily making themselves subject to the DCR and are prepared to come into compliance immediately. In such circumstances, the Attorney General's Manual on the Administrative Procedures Act, suggests that the 30 day notice requirement should not be an impediment to the issuance of the COL and/or LWA-B (Attorney General's Manual on the Administrative Procedures Act, pp. 36-37 - 1947).

SNC's COL application included an application for a second Limited Work Authorization (LWA-B) to which the above discussed policy issues also apply. SNC recognizes that the Commission might draw distinction between the policy implications of issuing the COL based on the DCD affirmation versus the LWA-B. LWA-B would authorize specifically the installation of the safety-related rebar, construction of the basemat, and embedments in the basemat for the nuclear island. Moreover, all LWA-B activities would be conducted at the risk of the applicant and are conducted pursuant to a site redress plan. The LWA-B would not bind the Commission to issue the COL or to certify the AP1000 design. Even if it were possible for the certified design to change between the affirmation and the effective date of the DCR, SNC would be required to conform the construction completed under the LWA-B to the final certified design. Thus, there is no risk that the activities conducted under LWA-B issued after affirmation of the DCR could result in a deviation from the certified design incorporated into 10 CFR Part 52. Accordingly, should the Commission conclude that the COL should not be issued until the effective date of the DCR, we believe that the Commission should exercise its discretion to issue the LWA-B based upon the affirmation of the DCR, provided that the remainder of the record on the mandatory hearing supports the issuance of the LWA-B.

The activities approved previously by the Commission by LWA-A for the Vogtle 3 and 4 nuclear island are nearing completion. Without impacting the Commission's complete and thorough safety review, issuance of the COL and/or LWA-B based on the affirmation of the DCR as requested above would avoid disruption of construction processes and the displacement of workers, which could make it more difficult to maintain standards of quality on the project that both the NRC and SNC demand.

For the foregoing reasons, SNC submits that, as a policy matter, a DCR under Part 52 should be considered "final" for the purpose of issuance of the COL and/or LWA-B upon the affirmation of the rule by the Commission. Should the Commission agree with this interpretation, SNC also requests that the NRC process allow for the issuance of the LWA-B separate from the COLs. We appreciate your consideration of this issue.

If you have any questions regarding this letter, please contact Mr. W. A. Sparkman at (205) 992-5061.

Mr. S. E. Kuczynski states he is the Chairman, President and Chief Executive Officer of Southern Nuclear Operating Company, is authorized to execute this oath on behalf of Southern Nuclear Operating Company and to the best of his knowledge and belief, the facts set forth in this letter are true.

Respectfully submitted,

SOUTHERN NUCLEAR OPERATING COMPANY

Stephen E. Kuczynski

S. E. Kuczynski
Chairman, President and Chief Executive Officer, Southern Nuclear Operating Company

Sworn to and subscribed before me this 20th day of July, 2011

Notary Public: *Sherry A. Mitchell*

My commission expires: _____

SEK/MLG

NOTARY PUBLIC STATE OF ALABAMA AT LARGE
MY COMMISSION EXPIRES: Dec 17, 2012
BONDED THRU NOTARY PUBLIC UNDERWRITERS

cc: Southern Nuclear Operating Company

Mr. J. A. Miller, Executive Vice President, Nuclear Development
Mr. J. T. Gasser, Executive Vice President, Nuclear Operations
Mr. D. H. Jones, Site Vice President, Vogtle 3 & 4
Mr. B. L. Ivey, Vice President, Nuclear Development Support
Mr. J. R. Johnson, Vice President, Quality and Compliance
Mr. T. E. Tynan, Vice President - Vogtle
Mr. D. M. Lloyd, Vogtle 3 & 4 Project Support Director
Mr. C. R. Pierce, AP1000 Licensing Manager
Mr. M. J. Ajluni, Nuclear Licensing Director
Mr. T. C. Moorer, Manager, Environmental Affairs, Chemistry and Rad. Services
Mr. J. D. Williams, Vogtle 3 & 4 Site Support Manager
Mr. J. T. Davis, Vogtle 3 & 4 Site Licensing Supervisor
Mr. W. A. Sparkman, COL Project Engineer
Ms. A. G. Aughtman, Lead AP1000 Licensing Project Engineer
Document Services RTYPE: GOV0208
File AR.01.02.06

Nuclear Regulatory Commission

Mr. V. M. McCree, Region II Administrator
Mr. F. M. Akstulewicz, Deputy Director Div. of Safety Systems & Risk Assess.
Mr. R. G. Joshi, Lead Project Manager of New Reactors
Ms. M. A. Sutton, Environmental Project Manager
Mr. M. D. Notich, Environmental Project Manager
Mr. L. M. Cain, Senior Resident Inspector of VEGP 1 & 2
Mr. J. D. Fuller, Senior Resident Inspector of VEGP 3 & 4

Georgia Power Company

Mr. T. W. Yelverton, Nuclear Development Director
Ms. A. N. Faulk, Nuclear Regulatory Affairs Manager

Oglethorpe Power Corporation

Mr. M. W. Price, Executive Vice President and Chief Operating Officer
Mr. K. T. Haynes, Director of Contracts and Regulatory Oversight

Municipal Electric Authority of Georgia

Mr. J. E. Fuller, Senior Vice President, Chief Financial Officer
Mr. S. M. Jackson, Vice President, Power Supply

Dalton Utilities

Mr. D. Cope, President and Chief Executive Officer

Bechtel Power Corporation

Mr. J. S. Prebula, Project Engineer (w/o enclosure)
Mr. R. W. Prunty, Licensing Engineer

Tetra Tech NUS, Inc.

Ms. K. K. Patterson, Project Manager

ATTACHMENT B

From: [Diane Curran](#)
To: tomclements329@cs.com; [Goldstein, Mindy](#); jim@ncwarn.org; jrunkle@pricecreek.com
Cc: arnie@fairewinds.com; sara@cleanenergy.org
Subject: RE: So. Co. letter on COL short circuit
Date: Thursday, October 13, 2011 11:31:22 AM

Hi everyone – Want to share this response I just got back from NRC PDR to my query re whether they have a copy of Southern Co. letter –

From: PDR Resource [<mailto:PDR.Resource@nrc.gov>]
Sent: Thursday, October 13, 2011 11:25 AM
To: Diane Curran
Subject: RE: Request for information

Diane,

This document is currently available in ADAMS only to NRC staff. It is marked as non-public, but non-sensitive. I do not know the reason why it is not publicly available in ADAMS. There is currently no date for public release. Please let me know if you want me to follow up with the NRC Vogtle Project Manager(s).

Sincerely,
Karen
Librarian
USNRC Public Document Room
301-415-4737; 1-800-397-4209
pdr.resource@nrc.gov

From: Diane Curran [<mailto:dcurran@harmoncurran.com>]
Sent: Wednesday, October 12, 2011 11:17 AM
To: PDR Resource
Subject: Request for information

Hello friends at the PDR – I cannot find this letter on ADAMS. Can you let me know whether it is posted there? Thanks, Diane Curran