

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP-20-08

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Dr. Sue H. Abreu  
Dr. Gary S. Arnold

In the Matter of

SOUTHERN NUCLEAR OPERATING  
COMPANY, INC.

(Vogtle Electric Generating Plant, Unit 3)

Docket No. 52-025-LA-3

ASLBP No. 20-967-03-LA-BD01

August 10, 2020

MEMORANDUM AND ORDER

(Denying Intervention Petition and Terminating Proceeding)

The genesis of this proceeding is a February 7, 2020 application submitted by Southern Nuclear Operating Company, Inc., (SNC) asking the Nuclear Regulatory Commission (NRC) to amend the existing 10 C.F.R. Part 52 combined license (COL) for the Vogtle Electric Generating Plant, Unit 3 (Vogtle 3). The Vogtle 3 COL authorizes SNC to construct the facility using the Westinghouse Electric Company (WEC) Advanced Passive 1000 (AP1000) design certified pursuant to 10 C.F.R, Part 52, Appendix D. The amendment as proposed revises the Vogtle 3 COL Appendix C (and plant-specific Tier 1) inspections, tests, analyses, and acceptance criteria (ITAAC) and corresponding plant-specific Tier 2 and Tier 2\* information in the Vogtle 3 updated final safety analysis report (UFSAR). Specifically, SNC seeks to modify the minimum seismic gap requirements between a portion of the opposite-facing walls of Vogtle 3's nuclear island-based auxiliary building and the annex building to accommodate as-built localized nonconformances in the auxiliary building wall. Further, because this proposed change requires

a departure from plant-specific Tier 1 information, SNC also requests an exemption from elements of the AP1000 certified design in accordance with 10 C.F.R. § 52.63(b)(1).<sup>1</sup>

Before the Licensing Board is the May 11, 2020 hearing request of pro se petitioners Blue Ridge Environmental Defense League and its local chapter Concerned Citizens of Shell Bluff (collectively BREDL) that includes two contentions challenging the SNC license amendment request (LAR).<sup>2</sup> SNC and the NRC Staff submitted answers asserting that the BREDL hearing request should be denied as lacking an admissible contention, with SNC also taking the position that BREDL lacks standing, claims that BREDL contested in its reply.<sup>3</sup>

For the reasons set forth below, while we find BREDL has established its standing to intervene, we conclude BREDL has failed to proffer an admissible contention. Consequently, we deny BREDL's hearing request and terminate this proceeding.

## I. BACKGROUND

### A. Applicable Regulatory Requirements/Criteria Associated with the Design Certification/COL Licensing Process

A standard design, such as the AP1000, is approved by the design certification rulemaking process, with the resulting design certification rule added to 10 C.F.R. Part 52 as an appendix. See 10 C.F.R. § 52.54(a); id. Part 52, app. D (design certification for AP1000 design). Each Part 52 certified design appendix also incorporates by reference a generic design certification document (DCD), which is submitted by the certified design applicant and

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<sup>1</sup> See Letter from Brian H. Whitley, Director, Regulatory Affairs, SNC, to NRC Document Control Desk at 1 (Feb. 7, 2020) (ADAMS Accession No. ML20038A939) [hereinafter LAR].

<sup>2</sup> See Petition for Leave to Intervene and Request for Hearing by [BREDL] Regarding [SNC]'s Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001 (May 11, 2020) at 1 [hereinafter BREDL Petition].

<sup>3</sup> See NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing (June 5, 2020) at 1 [hereinafter Staff Answer]; [SNC]'s Answer Opposing Petition to Intervene and Request for Hearing (June 5, 2020) at 32 [hereinafter SNC Answer]; Reply of [BREDL] to Answers of [NRC] and [SNC], LAR-20-001 (June 12, 2020) at 8 [hereinafter BREDL Reply].

contains information that is subject to NRC review and approval as part of the rulemaking process.<sup>4</sup> In addition, a COL applicant/licensee that references a certified design must provide a plant-specific final safety analysis report (FSAR),<sup>5</sup> which consists of the information in the generic DCD for that certified design, as modified and supplemented by any plant-specific departures or exemptions.<sup>6</sup>

The design certifications issued to-date by the agency, including the AP1000, have design information allocated to one of three categories: Tier 1, Tier 2, and Tier 2\*. See SRP at 14.3-9 to -11; see also 10 C.F.R. Part 52, app. D, § II.D, E, & F. Tier 1 information, which is the portion of the design-related information contained in the generic DCD for a certified design that is approved and certified by a design certification rule, should include “the top-level design features and performance characteristics” that are “the most significant to safety.” SRP at 14.3-9, 14.3-16. Because this information has been approved and certified by a design certification rule, any attempt to change or revise this information by a COL applicant/licensee outside the rulemaking process requires both an NRC-approved license amendment and an

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<sup>4</sup> See id. app. D, § II.A; NRC, Standard Review Plan, NUREG-800 § 14.3 [ITAAC], app. A at 14.3-9 (Mar. 2007) (Information on Prior Design Certification Reviews) (ADAMS Accession No. ML070660618) [hereinafter SRP]. In the case of the WEC AP1000, the applicable generic DCD is revision 19, the various sections of which can be found as an ADAMS package at ADAMS Accession No. ML11171A500. In citing the generic DCD in this decision, we reference the ADAMS accession numbers for the specific portions of the DCD the first time that a particular section is referenced.

<sup>5</sup> For Vogtle 3, the Tier 2 information portion of SNC’s updated FSAR is revision 8, while the Tier 1 information is revision 7, both of which can be found in an ADAMS package at ADAMS Accession No. ML19171A096. In citing to particular sections of these Tier 2 and Tier 1 documents, the first time a section is cited we will reference the ADAMS accession numbers for the specific portions of the document’s nonproprietary versions.

<sup>6</sup> See 10 C.F.R. § 52.47(a); see also id. Part 52, app. D, § I.C (definition of plant-specific DCD); SRP at 14.3-9. Because the Vogtle 3 UFSAR draws from several design information categories, it uses color-coded text to indicate what type of information is involved. See SNC, VEGP 3 & 4 UFSAR at unnumbered p. 8 (rev. 8 updated through Mar. 21, 2019) (providing UFSAR formatting legend designating text color codes for original WEC AP1000 revision 19 DCD content, departures from DCD revision 19 content, standard FSAR content, and site-specific FSAR content) (ADAMS Accession No. ML19171A051) [hereinafter UFSAR Tier 2].

exemption. The exemption must be based on a finding of the need to assure adequate protection of the public health and safety and the existence of special circumstances. See id. at 14.3-10; see also 10 C.F.R. §§ 52.63(a)(1), (b)(1), 52.98(f); id. Part 52, app. D, § VIII.A. Tier 2 information, on the other hand, is the portion of the design-related information contained in the generic DCD that is approved but not certified by the design certification rule. See SRP at 14.3-9; see also 10 C.F.R. Part 52, app. D, § II.E. Compliance with Tier 2 information is required, but generic changes to, or plant-specific departures from, Tier 2 information by a COL applicant/licensee are governed by a process that may or may not require NRC approval via a license amendment.<sup>7</sup> In contrast, Tier 2\* information is that portion of Tier 2 information, designated as Tier 2\* information in the generic DCD, for which any plant-specific change by a COL applicant/licensee mandates a license amendment but not an exemption (as it is not Tier 1 information). See SRP at 14.3-10; see also 10 C.F.R. Part 52, app. D, § VIII.B.6 (Tier 2\* information is designated in the generic DCD with italicized text or brackets and an asterisk).

#### B. SNC's License Amendment Request

Against this regulatory background, SNC submitted the LAR at issue in this proceeding on February 7, 2020. See supra note 1. Vogtle 3, one of a pair of AP1000 pressurized water reactor units being constructed at SNC's existing Vogtle facility in Burke County, Georgia, was issued a COL by the NRC in February 2012.<sup>8</sup> According to SNC, Vogtle 3 is nearing the end of

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<sup>7</sup> See SRP at 14.3-9 to -10; see also 10 C.F.R. Part 52, app. D, § VIII.B.5.a (indicating license amendment is not required for departure from Tier 2 information unless (1) there is a change/departure from Tier 1 or Tier 2\* information or any license technical specification; or (2) under Part 52, app. D., § VIII.B.5.b.-c., the Tier 2 information change would have a negative effect on (a) elements of the plant-specific DCD/FSAR per one of eight criteria, or (b) a plant-specific DCD/FSAR-identified ex-vessel severe accident design feature under either of two criteria).

<sup>8</sup> Office of New Reactors, NRC, [COL Vogtle 3, SNC et. al], Docket No. 52-025, License No. NPF-91, at 2, 18 (Feb. 10, 2012) (ADAMS Accession No. ML14100A106) [hereinafter Vogtle 3 COL].

construction, with fuel loading currently scheduled for late this year and operations to begin late next year. See Tr. at 12–13.

According to the analysis SNC provided in support of its LAR, as described in Vogtle 3's UFSAR and the facility's COL Appendix C (and the corresponding plant-specific Tier 1 information), Vogtle 3's nuclear island structures include the containment (which encompasses both the steel containment vessel and the containment internal structures) and the shield and auxiliary buildings, all of which are structurally integrated on a common concrete basemat that is embedded below the finished plant grade. These nuclear island structures are, SNC maintains, intended to protect safety-related equipment from the consequences of postulated internal or external events, including fires, flooding, hurricanes, tornadoes, tsunamis, and (as seismic Category I structures) a safe shutdown earthquake (SSE). In contrast, the portion of the annex building next to the nuclear island is a structural steel and reinforced concrete seismic Category II structure designed to withstand an SSE without collapsing.<sup>9</sup>

In its LAR, SNC also states that the UFSAR and COL Appendix C (and the corresponding plant-specific Tier 1 information) describe the annex building as structurally separated from the nuclear island structures by a 3-inch minimum gap above grade. According to SNC, this separation is to prevent interaction between the nuclear island structures and the adjacent seismic Category II structures, such as the annex building, during a seismic event. The minimum 3-inch gap, SNC claims, ensures that during an SSE event a minimum 1-inch gap

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<sup>9</sup> See LAR, encl. 1, at 3 (Request for License Amendment: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR-20-001)) [hereinafter Seismic Gap Analysis]; see also UFSAR Tier 2, at 3.7-7, 3.7-16 (indicating nuclear island buildings are seismic Category I while annex building is seismic Category II) (ADAMS Accession No. ML19171A057); Vogtle 3 COL, app. C, at C-408 to -409 (ITAAC); SNC, VEGP 3 & 4 Tier 1, at 3.3-1 to -2 (rev. 7 updated through Mar. 21, 2019) (Buildings) (ADAMS Accession No. ML19171A045) [hereinafter Tier 1 Information].

is maintained between the nuclear island and the annex building as required by the Vogtle 3 COL Appendix C ITAAC and the USFAR.<sup>10</sup>

But as the LAR recognizes, a portion of an auxiliary building wall fails to maintain this 3-inch gap.<sup>11</sup> For a segment of the north wall of the auxiliary building just opposite the southwest annex building wall<sup>12</sup> – specifically the section of the 50-foot high auxiliary building wall west of Column Line I from elevation 141 feet (about half way up the auxiliary building wall) through elevation 154 feet – a “bulge” in the auxiliary building wall leaves a minimum north-south gap of only 2-3/16 inches from the annex building wall.<sup>13</sup> See Seismic Gap Analysis at 4; see also Tr. at 46, 60–61. To address this as-built nonconformity,<sup>14</sup> the requested amendment would relax the north-south minimum gap requirement above grade for the auxiliary

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<sup>10</sup> See Seismic Gap Analysis at 3–4, 5; see also UFSAR Tier 2, at 3.8-66 (stating that required 3-inch gap above grade “provides space to prevent interaction between the nuclear island structures and the adjacent seismic Category II structures during a seismic event.”) (ADAMS Accession No. ML19171A058); Vogtle 3 COL, app. C, at C-440, tbl. 3.3-6 (ITAAC No. 819); Tier 1 Information, at 3.3-34, tbl. 3.3-6 (ITAAC Design Commitment No. 13); infra note 15. As the NRC Staff recognized, this minimum above grade 3-inch gap requirement was originally a 4-inch gap requirement but was revised in February 2018 via a Staff-approved SNC LAR. See Staff Answer at 6 & nn.22–23.

<sup>11</sup> With a description that SNC acknowledged was accurate relative to the Vogtle 3 facility, see Tr. at 44–45, the glossary of terms on the NRC’s website describes the auxiliary building as “[a] building at a nuclear power plant, which is frequently located adjacent to the reactor containment structure, and houses most of the auxiliary and safety systems associated with the reactor, such as radioactive waste systems, chemical and volume control systems, and emergency cooling water systems.” NRC, Full Text Glossary, <https://www.nrc.gov/reading-rm/basic-ref/glossary/auxiliary-building.html> (definition of “Auxiliary building”).

<sup>12</sup> According to SNC, the annex building is a large building that contains several different operations, including labs and low-level radioactive waste storage. See Tr. at 45.

<sup>13</sup> Because the 3-inch gap is unchanged above and below this anomaly, SNC maintains that this confirms it is, in fact, a “bulge” rather than attributable to some other factor like wall tilting. See Tr. at 46, 61–62.

<sup>14</sup> As SNC recognizes, “[t]he designation of the nonconformance as ‘as-built’ recognizes that this issue was discovered after the affected section of the nuclear island and annex building walls were constructed.” SNC Answer at 3 n.7 (citing Vogtle 3 COL, app. C, at C-31 (Vogtle 3 ITAAC Criteria) (“As-built means the physical properties of a structure, system, or component following the completion of its installation or construction activities at its final location at the plant site.”)).

building area in question from 3 inches to 2-1/16 inches, which SNC's LAR asserts would still leave more than the required 1-inch minimum gap.<sup>15</sup> See Seismic Gap Analysis at 5. This is the only change proposed in the requested amendment.<sup>16</sup>

SNC's LAR also maintains that both generic and site-specific analyses established that appropriate seismic displacement distances would be preserved between the two buildings. Using the 2D System for Analysis of Soil-Structure Interaction (SASSI) software program, generic modeling was done to determine the potential displacement between the auxiliary building and the turbine building, a non-nuclear island structure located just to the west of the annex building. According to SNC, because the structure of the adjacent turbine building is not as stiff as the annex building, turbine building displacements under SSE demand would be larger, making this turbine building modeling a valid point of comparison relative to the auxiliary building. Additionally, the LAR describes a site-specific study, done as a follow-on to a site-specific SASSI analysis, to compare perimeter wall deflections to account for significant building changes that were not included in the generic SASSI analysis, which the LAR maintains likewise provides a valid point of comparison relative to the nonconforming measured gap between the annex and auxiliary buildings. See id. at 6–8. Both the generic and site-specific analyses, SNC declared, showed that during a seismic event the gap between the auxiliary

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<sup>15</sup> The NRC Staff indicates that the changes to accomplish this would "include changes to Tier 2 Appendix 2.5E Section 5.2 and Subsection 3.7.2.8.1 information, UFSAR Tier 2\* Subsection 3.8.5.1 information, Tier 1 information in [ITAAC criteria] Table 3.3-6, and corresponding changes to Combined License Appendix C information." Staff Answer at 3 n.6.

<sup>16</sup> According to the LAR, the proposed change does not affect (1) "any additional COL Appendix C descriptions or figures because the minimum gap between the nuclear island and the annex building is not specified or dimensioned elsewhere in COL Appendix C text or figures"; (2) "the gap below grade between the nuclear island and the annex building as defined in the licensing basis"; (3) "the displacements in the east-west direction between the nuclear island and the annex building in the licensing basis"; or (4) "the gap above grade between the nuclear island and the annex building outside the area of the localized nonconformance." Seismic Gap Analysis at 5.

building and annex building at the area of nonconformance would still maintain a safe space “larger than the licensing basis requirement of a 1-inch minimum gap.” Id. at 7, 8.

In addition to this seismic assessment, the LAR provides an evaluation of differential foundation settlement impacts on the gap between Vogtle 3’s nuclear island structures and adjacent buildings. The LAR states that SNC created a site-specific settlement monitoring program to gather data regarding building foundation settlement, both during Vogtle 3 construction and after construction is complete, to verify any structural displacements from construction loads. The monitoring program settlement data for the past several years, SNC asserts, indicates that (1) the nuclear island basemat has deflected more in the center and less at the perimeter, which would tend to cause the perimeter walls to lean towards the center of the nuclear island and away from the annex building; and (2) the annex building deflection contour in the vicinity of the nuclear island is uniform so as not to result in tilt toward the nuclear island. See id. at 8; see also Tr. at 54.

Also, the LAR analysis regarding foundation settlement impacts claims that as wall construction progresses upward, construction methods require that any short-term settlement that would cause a lower wall to tilt toward the gap between buildings be offset by installing the upper wall at the original design location, thereby minimizing the tilt. As for long-term settlement, SNC maintains it is expected to be relatively small due to the thick engineered compacted fill and over-consolidated Blue Bluff Marl overlying the lower sand stratum at the Vogtle site. According to SNC, site-specific settlement data through 2019 indicates that no significant changes should be anticipated in either short-term or long-term settlement trends. Therefore, according to the LAR, differential settlement is not adversely impacting the gaps



between the nuclear island and the annex and other adjacent buildings.<sup>17</sup> See Seismic Gap Analysis at 8.

C. Procedural Background

Following receipt of the SNC LAR, on March 4, 2020, the NRC Staff issued a hearing opportunity notice that was published in the Federal Register six days later. See Vogtle Electric Generating Plant, Unit 3, 85 Fed. Reg. 13,944 (Mar. 10, 2020) [hereinafter Vogtle 3 Hearing Notice]. BREDL's hearing petition was timely submitted on May 11, 2020, followed by answers from the NRC Staff and SNC dated June 5, 2020, urging that the BREDL hearing request be rejected. BREDL filed a reply to the Staff and SNC responses on June 12, 2020. See supra notes 2–3. Having raised the possibility of holding an oral argument concerning the BREDL petition in its May 19, 2020 initial prehearing order, in subsequent orders issued on June 8 and

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<sup>17</sup> In addition to the analysis supporting its license amendment request, as part of its January 2020 application SNC also provided a justification for (1) a “no significant hazards consideration finding” pursuant to 10 C.F.R. § 50.92; (2) a categorical exclusion from the need to prepare an environmental assessment or an environmental impact statement pursuant to 10 C.F.R. § 51.22(b); and (3) an exemption to permit Tier 1 information changes pursuant to 10 C.F.R. Part 52, App. D, § VIII.A.4 and 10 C.F.R. § 52.63(b)(1). See Seismic Gap Analysis at 11–14; LAR encl. 2, at 2–6 (Exemption Request: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR-20-001)). BREDL has recognized that a no significant hazards consideration determination (NSHCD) by the NRC Staff associated with the SNC amendment request “is not subject to challenge in [an] adjudicator[y] proceeding.” Tr. at 24; see, e.g., NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 8–9 (2019) (declaring that petitioner’s request to review a Staff NSHCD “is inconsistent with 10 C.F.R. § 50.58(b)(6), which states that “[n]o petition or other request for review of or hearing on the staff’s [NSDCD] will be entertained by the Commission. The staff’s determination is final, subject only to the Commission’s discretion, on its own initiative, to review the determination.”). Additionally, notwithstanding a belated attempt during argument before the Board to suggest otherwise, see Tr. at 27–28, in its hearing petition BREDL makes no mention of any purported failings associated with the exemption so as to preserve a challenge to that request.

June 16, 2020, the Board established the protocols governing, as well as a July 1, 2020 date for, that initial prehearing conference.<sup>18</sup>

On July 1, the Board conducted a telephonic initial prehearing conference during which it heard oral argument from BREDL, the NRC Staff, and SNC regarding BREDL's standing to intervene, the admissibility of BREDL's two proffered contentions, and the issue of BREDL's access to documents associated with the SNC LAR.<sup>19</sup> See Tr. at 1–95.

## II. STANDING

### A. Legal Requirements for Standing

To establish standing, under the agency's rules of practice a request for a hearing/petition for leave to intervene must include:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended,] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1)(i)–(iv). Ultimately, to establish standing, the Commission “insist[s] that an intervenor have some direct interest in the outcome of the proceeding.” Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579

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<sup>18</sup> See Licensing Board Memorandum and Order (Establishing Initial Prehearing Conference Schedule) (June 16, 2020) at 1 (unpublished); Licensing Board Memorandum and Order (Regarding Initial Prehearing Conference Scheduling and Procedures) (June 8, 2020) at 2–4 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Order) (May 19, 2020) at 7 (unpublished).

<sup>19</sup> Subsequently, on August 4, 2020, acting pursuant to 10 C.F.R. § 50.91(a)(4), the NRC Staff issued the requested Vogtle 3 COL license amendment (and the corresponding exemption), along with a final NSHCD and a Staff safety evaluation. See Notification of Issuance of License Amendment (Aug. 4, 2020) at 1–2. The license amendment and associated documents can be found in an ADAMS package at ADAMS Accession No. ML20132A032.

(2005). And in assessing whether the appropriate showing has been made to establish that interest in an agency licensing proceeding, a hearing petition generally will be “construe[d] . . . in the petitioner’s favor” as it seeks to demonstrate standing.<sup>20</sup> Also, a pro se petitioner (such as BREDL) will not be held “to the same ‘standards of clarity and precision to which a lawyer might reasonably be expected to adhere.’”<sup>21</sup> Yet, whether pro se or otherwise, the petitioner bears the burden of establishing its standing. See Vogtle, CLI-20-06, 91 NRC at \_\_\_ (slip op. at 17).

Depending on the proceeding, a petitioner may seek to establish standing using either traditional judicial standing precepts or the proximity presumption. See Peach Bottom, CLI-05-26, 62 NRC at 579–83. And if the petitioner is a group (such as BREDL), organizational or representational standing may be sought. See Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 177, aff’d, CLI-12-12, 75 NRC 603 (2012).

A petitioner seeking to establish traditional standing must use contemporaneous judicial standing concepts that generally require a showing of an injury-in-fact within the zones of interest protected by the statutes that govern agency proceedings (e.g., the Atomic Energy Act, the National Environmental Policy Act), causation, and redressability. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Specifically, the petitioner must demonstrate “a ‘concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision,’ where the injury is ‘to an interest arguably within the zone of interests protected by the governing statute.’”<sup>22</sup> In addition, “a

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<sup>20</sup> S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Unit 3), CLI-20-06, 91 NRC \_\_\_, \_\_\_ & n.83 (slip op. at 17 & n.83) (June 15, 2020) (citing Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015)).

<sup>21</sup> Turkey Point, CLI-15-25, 82 NRC at 394 (quoting Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 468 (2015), aff’d, CLI-15-25, 82 NRC at 407).

<sup>22</sup> Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (quoting Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with the challenged license amendment, not simply a general objection to the facility.”<sup>23</sup> This, in turn, requires that a petitioner establish “a plausible nexus between the challenged license amendments and [petitioner’s] asserted harm.” Zion, LBP-98-27, 48 NRC at 277. Further, in making this showing a petitioner must “indicate how the particular license amendments at issue would increase the risk of an offsite release of radioactive fission products.” Zion, CLI-99-4, 49 NRC at 189.

Conversely, the proximity presumption, which has generally been applied in proceedings for reactor “construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool,” relieves a petitioner of the need to satisfy these traditional elements of standing. St. Lucie, CLI-89-21, 30 NRC at 329. Rather, the proximity presumption permits a petitioner to establish standing based on proximity to the geographic zone of potential harm from a nuclear facility. More specifically with respect to certain nuclear facility proceedings, a petitioner may use the proximity presumption if the petitioner lives,<sup>24</sup> has a significant property interest,<sup>25</sup> or otherwise has frequent contacts<sup>26</sup> within

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<sup>23</sup> Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999) (citations omitted), aff’d, LBP-98-27, 48 NRC 271 (1998), petition for review denied sub nom., Dienethal v. NRC, 203 F.3d 52 (D.C. Cir. 2000) (unpublished table decision); see also Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329–30 (1989) (“Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact’ that will result from the action taken . . .”).

<sup>24</sup> See Calvert Cliffs, CLI-09-20, 70 NRC at 915–16; St. Lucie, CLI-89-21, 30 NRC at 329.

<sup>25</sup> See USEC, Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 314–15 (2005) (granting standing based on petitioner’s holding title to house near nuclear facility).

<sup>26</sup> See Perry, CLI-93-21, 38 NRC at 95.

approximately 50 miles of a reactor.<sup>27</sup> A petitioner must specify contacts with the affected area in the petition,<sup>28</sup> and the failure to include such crucial information constitutes grounds for denying standing.<sup>29</sup>

The Commission, however, does not automatically grant standing in every reactor licensing proceeding to a petitioner residing within a 50-mile radius of the facility. The 50-mile proximity presumption does apply to proceedings for the issuance or renewal of a reactor construction permit/operating license under 10 C.F.R. Part 50 or an early site permit/COL under 10 C.F.R. Part 52.<sup>30</sup> In other proceedings, however, the proximity presumption is determined on a “case-by-case basis,”<sup>31</sup> considering the petitioner’s location and “the nature of the proposed action and the significance of the radioactive source.”<sup>32</sup> Notably, in license amendment cases the proximity presumption applies “only if the challenged license amendments present an obvious potential for offsite [radiological] consequences,”<sup>33</sup> which, in turn, depends on the “kind of action at issue, when considered in light of the radioactive sources at the plant.”<sup>34</sup>

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<sup>27</sup> This 50-mile presumed zone of potential harm corresponds roughly to the ingestion pathway emergency planning zone applicable to the currently licensed fleet of commercial power reactors. See Ross, LBP-12-3, 75 NRC at 189 n.27.

<sup>28</sup> See Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007) (stating the Commission requires “fact-specific standing allegations, not conclusory assertions,” such as “general assertions of proximity” to establish the proximity presumption); see also Peach Bottom, CLI-05-26, 62 NRC at 581.

<sup>29</sup> See PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>30</sup> See, e.g., Calvert Cliffs, CLI-09-20, 70 NRC at 914–18 (COL proceeding); Fla. Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 258–59 (2019) (subsequent license renewal proceeding), appeal dismissed as moot, CLI-20-03, 91 NRC \_\_, \_\_ (slip op. at 4) (Apr. 23, 2020).

<sup>31</sup> Peach Bottom, CLI-05-26, 62 NRC at 580.

<sup>32</sup> Id. at 580–81 (quoting Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116–17 (1995)).

<sup>33</sup> Zion, LBP-98-27, 48 NRC at 276 (quoting St. Lucie, CLI-89-21, 30 NRC at 330).

<sup>34</sup> Peach Bottom, CLI-05-26, 62 NRC at 581.

Standing can be shown by an organization such as BREDL by establishing either a cognizable injury to its organizational interests (organizational standing) or harm to the interests of its members (representational standing). See Ross, LBP-12-3, 75 NRC at 177. To establish representational standing, an organization must demonstrate that “(1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization’s lawsuit.” Private Fuel Storage, CLI-99-10, 49 NRC at 323 (citing Hunt v. Wash. State Apple Advertising Comm’n, 432 U.S. 333, 343 (1977)). Moreover, in this context, an organization must demonstrate “how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member.” Int’l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001).

Finally, although a narrow exception may exist for a petitioner who establishes standing in one case to employ that standing determination in another proceeding that is “merely another round in a continuing controversy,”<sup>35</sup> a petitioner generally “must make a fresh standing demonstration in each proceeding in which intervention is sought because a petitioner’s circumstances may change from one proceeding to the next.”<sup>36</sup>

With these legal precepts in mind, we turn to the question of whether BREDL has demonstrated standing to intervene in this proceeding.

#### B. BREDL Standing Analysis

As the basis for its standing, BREDL relies on the proximity presumption as the grounds upon which several of its members claim standing, which provides representational standing for

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<sup>35</sup> Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974).

<sup>36</sup> Bell Bend, CLI-10-7, 71 NRC at 138 & n.26 (“[T]he Board correctly concluded that [petitioner] could not rely on other boards’ findings of standing in the two prior proceedings concerning the Susquehanna facility.”) (citing Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162–63 (1993)).

itself based on the standing of those members. See BREDL Petition at 4. It has submitted a list of four members of BREDL and Concerned Citizens of Shell Bluff whose interests BREDL asserts it represents in this proceeding. Each of the members has filed a declaration stating that he lives within 50 miles of Vogtle 3. Each member further states that the license amendment “would increase the risk to my health and safety” and he is “concerned about releases of radioactive substances to the air and water, an accident involving the release of radioactive materials, and my ability to protect myself and my family if a radioactive accident were to occur.” E.g., Richard L. Colclough, Decl. of Standing at ¶ 3 (May 6, 2020) [hereinafter Colclough Decl.]. BREDL claims that its members have proximity standing by virtue of their residing “well within 25 miles” of Vogtle 3. BREDL Petition at 5.

The NRC Staff does not contest BREDL’s demonstration of standing. See Staff Answer at 14–15; Tr. at 63. SNC, however, challenges BREDL’s claim of standing because BREDL “has not established that the change to the minimum gap requirements proposed by the LAR presents an obvious potential for offsite consequences” and BREDL’s “conclusory assertions do not demonstrate or allege an injury caused by the license amendment.” SNC Answer at 30, 32.

We agree with BREDL and the NRC Staff that the proximity presumption applies here. BREDL’s declarants have alleged an increased risk of harm resulting from the license amendment. Each of BREDL’s members states that he considers Vogtle 3 is “inherently dangerous and the proposed amendment would increase the risk to my health and safety.” E.g., Colclough Decl. at ¶ 3. Moreover, in seeking to establish the admissibility of its Contention Two, BREDL makes several specific arguments supporting a plausible or obvious increased potential for offsite consequences resulting from the license amendment, not just from the operation of Vogtle 3. BREDL states that the LAR ignores a “serious structural and seismic risk issue at Vogtle.” BREDL Petition at 15. As explained more fully in section III.B.2 infra, BREDL’s Contention Two alleges that the LAR is misleading insofar as it seeks to “accommodate construction as-built localized nonconformances” of a certain wall at Vogtle 3.

Id. (quoting Seismic Gap Analysis at 3). BREDL claims that the “[nuclear island] is sinking” and therefore “the acceptance criteria of the ITAAC in the combined license are not capable of being met.” Id. at 15, 16. As a result of this nonconformance, BREDL argues there is an increased “likelihood of seismic failure and meltdown . . . which would be contrary to providing reasonable assurance of adequate protection of public health and safety.” Id.

We recognize there are limits to proximity standing when there are “no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel.” See Peach Bottom, CLI-05-26, 62 NRC at 582 (stating that the proposed license transfer did not implicate these concerns). Thus, the Commission has rejected proximity standing for license transfers,<sup>37</sup> license amendments associated with shutdown and de-fueled reactors,<sup>38</sup> and certain changes to worker-protection requirements.<sup>39</sup> Here, however, the challenged LAR requests a modification to the planned design of the physical plant that has been labeled as Tier 1 information of the type the NRC Staff has indicated is “the most significant to safety.” SRP at 14.3-16; see supra note 15.

The Commission has stated that “[i]n ruling on claims of ‘proximity standing,’ we decide the appropriate radius on a case-by-case basis.” Peach Bottom, CLI-05-26, 62 NRC at 580. In their declarations, BREDL’s members state that they live within 50 miles of the site of Vogtle 3 and provide a residence address, without further elaboration as to the specific distance. See, e.g., Colclough Decl. at ¶ 2. In its petition, BREDL states that the individuals “who signed declarations of standing live well within 25 miles of Plant Vogtle; in fact, some are within 5 miles.” BREDL Petition at 5. BREDL further notes that in a case involving an application for a

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<sup>37</sup> See Peach Bottom, CLI-05-26, 62 NRC at 581.

<sup>38</sup> See Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), aff’d, CLI-99-04, 49 NRC at 191–92; Exelon Generation Co., LLC, (Three Mile Island Nuclear Station, Units 1 and 2), LBP-20-02, 91 NRC 10, 30, 32 (2020).

<sup>39</sup> See St. Lucie, CLI-89-21, 30 NRC at 329–30.



power uprate, representational standing was granted to an organization with members who lived within 15 miles of the plant. Id. at 4 (citing Entergy Nuclear Vermont Yankee L.L.C. (Vermont Nuclear Power Station), LBP-04-23, 60 NRC 578, 553–54 (2006)). Neither SNC nor the Staff has argued that BREDL’s members live beyond BREDL’s stated radius from the Vogtle plant.

And while, as we observed above, decisions regarding standing in prior proceedings relating to a facility are not dispositive for a subsequent proceeding, we note that two 2016 licensing board decisions found BREDL had standing to challenge other SNC license amendment requests for changes to Vogtle 3 design information. One concerned containment internal structural wall thickness requirements and the other involved the hydrogen ignitor subsystem design, both of which implicated Tier 1 information changes.<sup>40</sup> Neither SNC nor the NRC Staff discussed those cases in their answers, but during the July 2020 oral argument SNC did seek to distinguish them. SNC’s counsel asserted the two cases were based on licensing board determinations concerning a “plausible, credible risk of offsite consequences,” as opposed to being “either speculative or ha[ving] such low probability that they really weren’t real offsite consequences.” Tr. at 49. In contrast, SNC asserts, BREDL here “has failed to even try to connect the offsite consequences it alleges with the particular change in question.” Id. SNC claims that Contention Two and the supporting affidavit from its expert Arnold Gundersen allege an injury that “is much more in the nature of a failure of the nuclear island foundation that causes some severe damage to the nuclear island structure itself due to settlement rather than the walls interacting during a safe shutdown earthquake.” Tr. at 49–50. According to SNC, to establish the basis for standing, “they’ve at least got to tie their offsite consequences to the

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<sup>40</sup> See S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-16-10, 84 NRC 17, 49 (2016), aff’d on other grounds, CLI-17-2, 85 NRC 33, 38 n.23 (2017); S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-16-5, 83 NRC 259, 265 & n.7, 276 (2016).

particular change being requested” regarding the minimum distance between the walls of the auxiliary and annex buildings. Id. at 50.

As the Staff asserted,<sup>41</sup> the member declarations in this instance, when considered along with BREDL’s pro se petition, show that there are sufficient allegations of increased risk of harm associated with the amendment to demonstrate the basis for its representational standing through the application of the proximity presumption.<sup>42</sup> Whether the mechanism for triggering that harm, as outlined in BREDL’s contentions, is viable and within the scope of the amendment is a matter that goes to the admissibility of the contentions challenging the amendment. Our decision on standing, however, is not a ruling on either the admissibility or the merits of BREDL’s contentions.<sup>43</sup> Thus, our standing ruling does not mean that BREDL, by focusing on settlement of the nuclear island foundation, has proffered an admissible contention. Rather, it means only that BREDL’s assertions have satisfied the requirements governing standing, with the result that we move on to consider the admissibility of its contentions.

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<sup>41</sup> See Staff Answer at 15; see also Tr. at 66.

<sup>42</sup> See Vogtle, LBP-16-5, 83 NRC at 271–74. In this regard, we note that the SNC LAR analysis described the safety significance of the building walls in question. See supra note 9 and accompanying text. Moreover, in response to a Board hypothetical question regarding the safety impacts of a wall interaction and breach resulting from an inability to maintain the required gap, SNC counsel indicated that it was not SNC’s position that there would be no safety consequences from such an event. See Tr. at 48.

<sup>43</sup> See Vogtle, LBP-16-5, 83 NRC at 274 & n.78 (citing Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 93 (2003) (concluding that an “obvious potential for offsite consequences . . . is not in itself sufficient to support an admissible contention”)).

### III. CONTENTION ADMISSIBILITY

#### A. Pleading Requirements for an Admissible Contention

To participate as a party in this proceeding, in addition to establishing its standing, see section II.B supra, BREDL also must proffer at least one contention that meets the Commission's admissibility requirements found in 10 C.F.R. § 2.309(f)(1). For a proposed contention to be admitted for further litigation, it must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . [P]rovide 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)(i)–(vi). These six criteria aim to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) [hereinafter 2004 Part 2 Changes]. The petitioner bears the burden to satisfy each of these criteria,<sup>44</sup> while a failure to comply with any of the

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<sup>44</sup> See Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015) (“[I]t is Petitioners' responsibility, not the Board's, to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for

requirements constitutes grounds for rejecting a proposed contention.<sup>45</sup> And with regard to a pro se petitioner such as BREDL, while the Commission has stated that “[a] board may consider the readily apparent legal implications of a pro se petitioner’s arguments, even if not expressly stated in the petition,” it also has indicated that “[t]his authority is limited in that the petitioner—not the board—must provide the information required to satisfy our contention admissibility standards.” NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-18-4, 87 NRC 89, 96–97 (2018).

In particular regarding the dictates of section 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as established by the Commission’s hearing notice. See Pub. Serv. Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170–71 (1976). Thus, a proposed contention challenging a license amendment must confine itself to the “health, safety or environmental issues fairly raised by [the license amendment].”<sup>46</sup> Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981). Consequently, challenges to the current licensing basis of a plant, rather than to the requested facility modification, are not within the permissible scope of a license amendment proceeding and are

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admission.”) (quoting Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998)).

<sup>45</sup> See 2004 Part 2 Changes, 69 Fed. Reg. at 2221; see also Private Fuel Storage, CLI-99-10, 49 NRC at 325.

<sup>46</sup> In this regard, NRC regulations define the Commission’s scope of review of a license amendment application broadly: “In determining whether an amendment to a license, construction permit, or early site permit will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses, construction permits, or early site permits to the extent applicable and appropriate.” 10 C.F.R. § 50.92(a). As summarized by SNC, the “applicant must satisfy the requirements of 10 [C.F.R.] § 50.90 and demonstrate that the requested amendment meets all applicable regulatory requirements and acceptance criteria and does not otherwise harm the public health and safety or the common defense and security.” SNC Answer at 8–9 (quoting Tenn. Valley Auth. (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 35 (2002)).

instead properly lodged as matters warranting enforcement action pursuant to the process prescribed by 10 C.F.R. § 2.206.<sup>47</sup>

B. BREDL Contentions

1. Contention One

BREDL frames its first contention as follows:<sup>48</sup> “CONTENTION ONE: License Revocation for Materially False Statements.” BREDL Petition at 9 (emphasis omitted). In asserting that SNC’s Vogtle 3 combined license should be revoked for materially false statements, BREDL claims the following phrase in the LAR is not true: “In order to facilitate the construction of the nuclear island and adjacent buildings . . . .” Id. at 10 (quoting Seismic Gap Analysis at 4) (omitting emphasis added). BREDL also points out that its expert,<sup>49</sup> Arnold Gundersen, alleges that this is a false justification by SNC because “[t]he construction of the walls and foundations in question were completed at least a half-decade ago, therefore, it is

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<sup>47</sup> See, e.g., NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-19-07, 90 NRC 1, 14 (2019) (“If [the petitioner] seeks to challenge the ongoing operation of [the facility], it may file a petition seeking enforcement action under 10 C.F.R. § 2.206.”).

<sup>48</sup> Relative to the preparation of its contentions, BREDL asserts that its “review and analysis [has] been seriously hampered due to the lack of any complete engineering analyses or accurate information provided for review by SNC.” BREDL Petition at 6. Further, to highlight its efforts to try to gain access to such information, BREDL points to its outstanding Freedom of Information Act (FOIA) request seeking information associated with a May 26, 2020 NRC Staff audit report in which the Staff indicated it used non-docketed information obtained from SNC in assessing the SNC LAR. See BREDL Reply at 1–2 & nn.1, 4; Tr. at 24, 73; see also Memorandum from Cayetano Santos, Jr., Project Manager, Vogtle Project Office, Office of Nuclear Reactor Regulation (NRR), to Victor Hall, Chief, NRR Vogtle Project Office at 2 (May 26, 2020) (ADAMS Accession No. ML20141L698). According to BREDL, because it has been unable to gain access to these documents, it “reserve[s] the right to modify this [petition and Arnold Gundersen’s supporting declaration] when the appropriate information is finally placed in ADAMS for public review as required by federal statute,” BREDL Petition at 7, an apparent reference to the opportunity afforded BREDL under the agency’s rules of practice to submit new or amended contentions regarding information not previously available, see 10 C.F.R. § 2.309(c).

<sup>49</sup> We note as well that SNC has challenged Mr. Gundersen as lacking sufficient expertise in seismic and structural issues to serve as an expert witness in support of BREDL’s hearing petition, see SNC Answer at 11–12, a claim BREDL vigorously contests, see BREDL Reply at 6–8. Given we conclude in this decision that both of BREDL’s proffered contentions are inadmissible, we need not resolve this dispute.

technically impossible to ‘facilitate construction’ on structures that were completed at least five years earlier and that fall under strict seismic regulatory guides.” Id. at 11 (quoting Gundersen Decl. at 5). BREDL theorizes that there are only three possible explanations for this perceived inconsistency: “1) Westinghouse knew and did not inform SNC; 2) Both Westinghouse and SNC knew and did not inform NRC in a timely fashion; or 3) Westinghouse, SNC and NRC staff knew and delayed seeking amendment of the license under an expedited schedule in order to limit scrutiny.” Id.; see Gundersen Decl. at 6. BREDL claims that the true justification for the LAR is “the discovery that walls and the entire foundation of the Auxiliary Building have inexplicably moved, sunk and become distorted.” BREDL Petition at 9.

Contention One does not challenge the LAR itself, but rather the timing and SNC’s underlying motivations for the LAR. Moreover, as a means to address the purported wrongdoing that the LAR reflects, BREDL broadly seeks to revoke SNC’s Vogtle 3 COL, a remedy BREDL itself seemingly acknowledged at the July 2020 oral argument is beyond the scope of the Board’s authority in this proceeding. See Tr. at 19 (BREDL’s representative stating “I’ve come to understand that license revocation may be outside of the hand of the Atomic Safety [and] Licensing Board in this matter.”); 10 C.F.R. § 2.309(f)(1)(iii). Indeed, such a claim is more appropriate for a 10 C.F.R. § 2.206 petition.<sup>50</sup>

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<sup>50</sup> See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-674, 15 NRC 1101, 1103 (1982) (indicating because licensing board lacks jurisdiction to suspend previously issued construction permit, intervenor seeking such relief must file 10 C.F.R. § 2.206 petition). The NRC Staff notes in its answer that it referred BREDL’s petition to the NRC’s 10 C.F.R. § 2.206 coordinator should BREDL choose to pursue a remedy under this separate process. See Staff Answer at 21 n.95. BREDL indicated that it was contacted by the 10 C.F.R. § 2.206 coordinator and intends to pursue that separate route. See BREDL Reply at 2; Tr. at 26–27.

In addition, the Staff indicated that because BREDL’s claims allege improper conduct on the part of a licensee and by agency employees, it also has forwarded those concerns for consideration under the Staff’s allegations management program and for review by the agency’s Office of the Inspector General. See Staff Answer at 18 n.86, 19 n.89. According to BREDL, the allegations referral resulted in a June 4, 2020 letter from an NRC allegations program team leader finding “that there was ‘no specific indication of wrongdoing’ with regard to the timeliness

Furthermore, BREDL's Contention One fails to meet other contention admissibility standards under 10 C.F.R. § 2.309(f)(1). As SNC points out, while Mr. Gundersen asserts that SNC has improperly withheld information for a half-decade regarding the wall construction anomaly to facilitate construction of Vogtle 3, he provides no support for his alleged timeline of construction at Vogtle 3. Indeed, SNC argues, BREDL's timeline claim is easily contradicted by publicly-accessible information showing that "SNC has only neared completion of the auxiliary building within the last quarter of 2019 and first quarter of 2020. Accordingly, the identified as-built nonconformance could not have been identified until this construction was complete."<sup>51</sup> BREDL has provided nothing to contradict this statement or to explain why it is inaccurate. Contention One thus also cannot be admitted because it lacks adequate factual or expert opinion support as is required by section 2.309(f)(1)(v).

## 2. Contention Two

BREDL denotes its second contention as follows: "CONTENTION TWO: Basemat, Foundation and Construction Factors Create Unacceptable Operational Risk to Public Health and Safety." BREDL Petition at 12 (emphasis omitted). And in detailing Contention Two, BREDL asserts:

Construction of Vogtle Unit 3 should be stopped until [SNC]: 1) reevaluates the structural integrity of the entire Nuclear Island, 2) performs a complete root cause analysis of the new stresses on the basemat upon which the Nuclear Island on Vogtle Unit 3 is being constructed, 3) presents the complete analyses and root cause analysis information in public licensing hearings, and 4) an entirely new licensing review and full analysis of the new stress conditions placed on other components on the site that are no longer level as a result of the disproportionate sinking have been concluded and subjected to satisfactory independent engineering review.

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of SNC's reporting to NRC on the stability of the Nuclear Island basemat." BREDL Reply at 2 & n.3.

<sup>51</sup> SNC Answer at 14–15 & nn.58–59 (citing Staff 2019 and 2020 inspection reports indicating portion of auxiliary building that is the subject of February 7, 2020 SNC LAR was under construction in the 2019-2020 timeframe).

Id. at 12–13. Underlying this contention is BREDL’s concern that “the so-called seismic gap [is] the result of foundation problems which have plagued the construction of Vogtle 3 and 4 reactors since the very beginning of [the] construction project.” Id. at 13–14. BREDL also emphasizes that its expert, Mr. Gundersen, claims that the “differential downward deflection forming at the center of the Vogtle foundation . . . is called ‘dishing’ or ‘cupping’ and . . . was never anticipated and therefore was not considered in Vogtle’s original design.” Id. at 15; see Gundersen Decl. at 9. Further, Mr. Gundersen states that although “[t]he “as-built” condition of the wall in question was correct at the time it was built . . . the wall moved after it was constructed because the [nuclear island] is sinking.” Gundersen Decl. at 8. And building on Contention One, BREDL argues that SNC “is attempting to obfuscate the true facts.” BREDL Petition at 14. Specifically, BREDL argues that SNC failed to address the following in the LAR:

1) The foundation of the Seismic Category 1 Nuclear Island has settled “more at the center and less at the perimeter”; 2) A wall has moved closer to the [nuclear island]; 3) That same wall now is not level, and is leaning; 4) If the foundation of the NI has settled, “more at the center and less at the perimeter,” other systems and structures must also have become deformed yet have not been evaluated.

Id. at 15 (quoting Seismic Gap Analysis at 8). Therefore, BREDL maintains that “the acceptance criteria of the ITAAC in the combined license are not capable of being met” and there is an increased “likelihood of seismic failure and meltdown.” Id. at 16.

As set forth in the Federal Register hearing opportunity notice, this license amendment proceeding is narrowly focused solely on the requested action — a proposed localized reduction in the seismic gap between the Vogtle 3 auxiliary building and the annex building. See Vogtle 3 Hearing Notice, 85 Fed. Reg. at 13,945. Yet, BREDL does not raise concerns with this specific action. Instead, BREDL raises claims about the “settlement” of the entire nuclear island and seeks the remedy of stopping construction at Vogtle 3. Neither BREDL’s broad claims nor the broad remedy it seeks is within the scope of this narrow license amendment proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii).



At the same time, contrary to 10 C.F.R. § 2.309(f)(1)(vi), BREDL does not show a genuine dispute with the LAR on a material issue. As SNC points out, the LAR does not “suggest or indicate that either the [gap] nonconformance or the modification is in response to settlement issues.” SNC Answer at 20. But even if this LAR did ask for a change in accepted differential settlement for Vogtle 3, which it does not, BREDL’s assertions that settlement was not considered in the design of Vogtle 3 are unsupported and do not show a genuine dispute. The UFSAR for Vogtle 3 does contain values for total and differential settlement.<sup>52</sup> The UFSAR acknowledges that differential settlement could impact the tilt of the nuclear island buildings and describes the limit of acceptable differential settlement.<sup>53</sup> And SNC has not sought to alter these settlement findings.

Moreover, with its unsupported statements that “[a] wall has moved closer to the [nuclear island]” and “[t]hat same wall now is not level, and is leaning,” BREDL Petition at 15, BREDL likewise does not show a genuine dispute with the LAR. As explained in section I.B supra, the settlement evaluation section of the LAR indicates that the “nuclear island basemat has deflected more in the center and less at the perimeter which would tend to cause the perimeter walls to lean towards the center of the nuclear island. Theoretically, this suggests that the nuclear island tends to tilt away from the annex building.” Seismic Gap Analysis at 8 (emphasis

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<sup>52</sup> UFSAR Tier 2, at 2.5-173 (ADAMS Accession No. ML19171A055); see also id. at 2.5-216, tbl. 2.5-1 (Limits of Acceptable Settlement without Additional Evaluation); Tier 1 Information, at 5.0-3, tbl. 5.0-1 (Site Parameters); WEC, AP1000 [DCD] at 3.8-69 (rev. 19 June 21, 2011) (Tier 2 Chapter 3, Design of Structures, Components, Equipment & Systems) (“The site conditions considered in the evaluation provide reasonable bounds on construction induced stresses in the basemat. Accordingly, the basemat design is adequate for practically all soil sites and it can tolerate major variations in the construction sequence without causing excessive deformations, moments and shears due to settlement over the plant life.”) (ADAMS Accession No. ML11171A431).

<sup>53</sup> See UFSAR Tier 2, at 2.5-173. The total and differential settlement values are found in plant-specific Tier 1, Table 5.0-1, and plant-specific Tier 2, Tables 2.0-201 and 2.5-1. See Tier 1 Information, at 5.0-3, tbl. 5.0-1; UFSAR Tier 2, at 2.08, tbl. 2.0-201 (Comparison of AP1000 DCD Site Parameters and Vogtle Electric Generating Plant Units 3 and 4 Site Characteristics) (ADAMS Accession No. 19171A052); id. at 2.5-216, tbl. 2.5-1.

added). The LAR goes on to say that “the foundation deflection contour of the annex building is uniform in the vicinity of the nuclear island, which does not result in tilt of the perimeter structures towards the nuclear island.” Id. BREDL, however, does not acknowledge this contradiction with its assertions or otherwise provide support for its position that the wall is acting in a way contrary to the physics precept described in the LAR.

Additionally, contrary to 10 C.F.R. § 2.309(f)(1)(v), BREDL does not provide a concise statement of the alleged facts or expert opinions that support its position. “Neither mere speculation nor bare conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention.”<sup>54</sup> While BREDL cites Mr. Gundersen’s statements to bolster its contention, neither BREDL nor Mr. Gundersen referenced any of “the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue [at a hearing],” which is required under section 2.309(f)(1)(v). Mr. Gundersen makes bare assertions like “[u]sing the Generic SASSI bounding analysis and linear interpolation are completely inappropriate and places public health at risk, because both the Generic SASSI bounding analysis and linear interpolation are based upon the mathematical assumption of a level foundation.” Gundersen Decl. at 13. Mr. Gundersen, however, fails to cite parts of the LAR with which he disagrees. Nor does he explain why the results of the SASSI analysis are insufficient to support the LAR’s conclusion that a greater than one-inch gap between the nuclear island and annex building will still be maintained during an SSE event. Similarly, while Mr. Gundersen asserts numerous times that SNC “admits that the Nuclear Island (NI) foundation is sinking disproportionately” or “has known and indeed spent years measuring the disproportional settling of the Nuclear Island,” he fails to cite to any specific instances in which SNC has made such statements, much less that SNC

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<sup>54</sup> S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-03, 65 NRC 237, 253 (2007) (citing Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)).

“has known . . . [about these matters for] years.” Gundersen Decl. at 10, 11; see id. at 6, 7, 15.

Without supporting citations, as required by section 2.309(f)(1)(v), these claims are nothing more than mere speculation.

Finally, to the extent that BREDL is attempting to challenge any of the Vogtle 3 ITAAC when it alleges “the LAR show prima facie the acceptance criteria of the ITAAC in the combined license are incapable of being met,” BREDL Petition at 16, its contention is outside the scope of this proceeding. BREDL cites to 10 C.F.R. § 52.103(b) as support for why Contention Two shows a genuine dispute with the licensee. Id. Section 52.103(b), however, lists the requirements for requesting a hearing under section 52.103(a) to challenge whether a facility as constructed complies with the acceptance criteria in the COL applicable to that facility. BREDL does not show how its ITAAC challenge is within the scope of this LAR proceeding, which does not fall within the ambit of section 52.103,<sup>55</sup> or even list which ITAAC it specifically challenges.<sup>56</sup>

In sum, because BREDL fails to meet one or more of the six criteria for contention admissibility, Contention Two cannot be admitted for further litigation in this proceeding.

#### IV. CONCLUSION

For the reasons we detail above in section II.B, we conclude that BREDL’s hearing request in this license amendment proceeding provides sufficient information to establish standing to intervene. BREDL has not, however, set forth an admissible contention because, as

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<sup>55</sup> The contention admissibility standard that requires a petitioner to show a genuine dispute on a material issue of law or fact specifically excludes proceedings under 10 C.F.R. § 52.103. See 10 C.F.R. § 2.309(f)(1)(vi). Instead, section 53.103 requires that a petitioner seeking to challenge the acceptance criteria for a COL must establish a prima facie case that such criteria have not been, or will not be, met, see id. § 53.103(b); see also id. § 2.309(f)(1)(vii), a pleading threshold that BREDL clearly has not reached in this instance.

<sup>56</sup> Additionally, we note that for Vogtle 3, there was an April 13, 2020 deadline for hearing requests posing a challenge associated with any of the Vogtle 3 ITAAC, see Commission Order, S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Unit 3), Docket No. 52-025 (Apr. 9, 2020) at 2 (unpublished), which raises a substantial question about the timeliness of any ITAAC-based challenge by BREDL here.

we outline in section III.B supra, it failed to meet the standards for contention admissibility in 10 C.F.R. § 2.309(f)(1). Accordingly, its hearing request must be denied.

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For the foregoing reasons, it is this tenth day of August 2020, ORDERED, that:

1. The May 11, 2020 hearing request of petitioners Blue Ridge Environmental Defense League and its chapter Concerned Citizens of Shell Bluff is denied and this proceeding is terminated.

2. In accordance with the provisions of 10 C.F.R. § 2.311, as this memorandum and order rules upon an intervention petition, any appeal to the Commission from this memorandum and order must be submitted within 25 days after this issuance is served.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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G. Paul Bollwerk, III, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Sue H. Abreu  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 10, 2020

## Additional Views of Bollwerk, Administrative Judge

While I agree fully with the determinations reached by the Board regarding the standing and contention admissibility issues presented in this proceeding by BREDL's hearing petition, because of my concern about the issue of document access raised by BREDL in its petition, see note 48 of the Board's decision, I wish to express some additional views.

BREDL asserts that despite entreaties to the NRC Staff, including an FOIA request, it has been unable to gain access to documentary material that SNC provided to the Staff for the Staff's review in determining the sufficiency of the SNC LAR at issue here, including information referenced by the Staff in a May 26, 2020 audit report concerning technical support documentation for the LAR. See BREDL Petition at 6–7. According to BREDL, it should have, but has not, been provided with that information and afforded an opportunity to assess its significance and incorporate the material into its challenges to the SNC amendment request. See id.; BREDL Reply at 1 n.1, 2.

Given the Commission's "strict by design" standards for contention admissibility and the concomitant expectation placed upon intervenors, pro se or otherwise, to provide credible support for the contentions they proffer,<sup>1</sup> petitioner access to relevant information regarding a license application is a matter of concern. And in the case of BREDL's claim for access to additional SNC documents to frame its contentions, two different timeframes seemingly would need to be considered: (1) SNC information that was part of the Staff review process associated with the docketing of the SNC license application request; and (2) SNC material that becomes available following docketing of the application. Agency regulations suggest this differentiation, indicating that upon receipt an application for a licensing action is subject to an

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<sup>1</sup> AmerGen Energy Co. (Oyster Creek Nuclear Generation Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001)).

initial Staff review to ensure it is “complete and acceptable for docketing.” 10 C.F.R. § 2.101(a)(3). Then, upon docketing, the Staff’s detailed technical review of the application begins along with the application’s receipt and availability, and any appropriate hearing opportunity, being noticed in the Federal Register. See id. § 2.101(c).

As referenced in the Board’s decision, a focus of BREDL’s document access concern is six SNC documents listed in the Staff’s May 26, 2020 audit report. According to the report, these documents, which were made available for Staff review as non-docketed information via an SNC/WEC electronic reading room, were used by the Staff as part of the post-docketing application review process to verify the information and conclusions in the SNC licensing request.<sup>2</sup> While consistent with recently revised Staff guidelines,<sup>3</sup> the Staff’s use of that portal to access this information apparently means those applicant documents did not become agency records accessible to BREDL as part of the licensing docket for the SNC application (or seemingly via its FOIA request).<sup>4</sup> Yet, consistent with agency adjudicatory practice, such

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<sup>2</sup> See Memorandum from Cayetano Santos, Jr., Project Manager, NRR Vogtle Project Office, to Victor Hall, Chief, NRR Vogtle Project Office at 2 (May 26, 2020) (ADAMS Accession No. ML20141L698) [hereinafter Staff Audit Report]; id., encl. at 2, tbl. 1 (Regulatory Audit Summary for [LAR]: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR-20-001)).

<sup>3</sup> See NRR, NRC, Regulatory Audits, NRR Office Instruction LIC-111, at 8, 9 (rev. 1 Oct. 31, 2019) (indicating that in conducting a licensing audit the Staff may use an online portal to access non-docketed information that should not permit the documents to be downloaded or printed so as to become agency records, with any documents reviewed required to be listed in the audit report) (ADAMS Accession No. ML19226A274) [hereinafter LIC-111 Rev. 1].

<sup>4</sup> While NRC Staff use of non-docketed information in performing a license review audit at a licensee facility is a longstanding practice, Staff guidelines sanctioning the use of remote/portal access to such documents for auditing purposes are relatively recent. Compare NRR, NRC, Regulatory Audits, NRR Office Instruction LIC-111, at 56 (Dec. 29, 2008) (non-docketed licensee information may be reviewed at any time during an audit, but “[i]n general, non-docketed information should not be removed from the audit site.”) (ADAMS Accession No. ML082900195), with LIC-111 Rev. 1, at 8, 9 (Oct. 2019 revision discussing protocols for portal access to non-docketed information). As was previously the case with onsite audits, such a portal arrangement has the advantage of reducing agency resource expenditures for implementing security measures to protect nonpublic licensee information from disclosure and, presumably, responding to FOIA requests (such as that lodged by BREDL, see

applicant documents likely would be subject to disclosure in this proceeding only as discoverable material if a pertinent BREDL contention were to be admitted.<sup>5</sup>

As to the NRC Staff's access to the SNC information the Staff used to make a docketing decision about the SNC application, this seemingly would be shaped by the Staff's guidance regarding its application acceptance/docketing process. Under that guidance, the Staff is to consider whether (1) the application is complete in scope, such that there are no "significant analyses or evaluations missing" from the application; and (2) the information and analyses provided in support of the application evidence any "significant, obvious problems."<sup>6</sup> Those instructions also indicate that if the scope of the application is incomplete or the information is insufficient, the application must be considered unacceptable such that it should be returned to the applicant or an additional opportunity provided to supplement the application before docketing. See Acceptance Review Procedures, app. B, at 9 (Guide for Performing Acceptance Reviews). On the other hand, if the application is found acceptable for docketing, the instructions indicate that determination should be documented in an e-mail or letter stating that the Staff found that the application provides "technical information in sufficient detail to enable the NRC staff to complete its detailed technical review and make an independent assessment regarding the acceptability of the proposed amendment in terms of regulatory requirements and

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note 48 in the Board's decision) that otherwise would encompass such material if held by the agency. In addition, as apparently was the case in this proceeding, see Staff Audit Report at unnumbered p. 2 (indicating the Staff "conducted an audit from March 10 to April 30, 2020, via the [WEC] electric reading room"), the process allows access to non-docketed licensee information without having to travel to the licensee facility.

<sup>5</sup> See Wisc. Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982) (indicating discovery on contention's subject matter can be obtained once the contention is admitted for litigation).

<sup>6</sup> NRR, NRC, Acceptance Review Procedures, NRR Office Instruction LIC-109, app. B, at 9 (rev. 2 Jan. 9, 2017) (ADAMS Accession No. ML16144A521) [hereinafter Acceptance Review Procedures].

the protection of public health and safety and the environment.” Id., app. C, at C-9 (Guide for Performing Acceptance Reviews: Example Letters). The Staff issued such a letter in this instance.<sup>7</sup>

Additionally, the acceptance review instructions indicate that any information deficiency in an application is to be cured by contacting “the licensee or applicant to communicate the information needed and understand their course of action”; establishing a “date-specific deadline by which the licensee or applicant must submit the information”; and issuing “a letter to the licensee or applicant identifying the information needed and the verbally established deadline.” Id. at 6. This guidance indicating that information needed for docketing review should be within the hands of the agency apparently was followed here as well as the SNC LAR, the only applicant document utilized by the Staff for its docketing determination,<sup>8</sup> was docketed information available to BREDL.

Thus, in contrast to the NRC Staff’s recently revised post-docketing license application review instructions that permit the Staff to utilize non-docketed information accessed via an applicant portal, nothing in the acceptance review instructions appears to authorize the Staff when making a docketing decision to consider applicant information not in the possession of the agency. All this suggests that in preparing a hearing request challenging a license application, a petitioner such as BREDL, while arguably not entitled to access more applicant information

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<sup>7</sup> See Letter from Cayetano Santos, Project Manager, NRR Vogtle Project Office, to Brian H. Whitley, Director, Regulatory Affairs, SNC (Feb. 21, 2020) (letter embedded in e-mail from Cayetano Santos to Yasmeeen N. Afafeh & Brian Whitley (Feb. 21, 2020 8:37 ET)) (ADAMS Accession No. ML20052H043) [hereinafter Staff Docketing Letter].

<sup>8</sup> According to the NRC Staff, this Staff license acceptance review was based only on the SNC application without reviewing any additional documents, see Tr. at 70; see also Staff Docketing Letter at unnumbered p. 2 (advising that “[t]he staff has reviewed your application” and concluded it provides sufficient technical information for docketing), including the seismic analyses and settlement survey data cited in the application, see section I.B of the Board’s decision. As SNC indicated, those documents were not publicly available information. See Tr. at 60.



than the Staff had before it in making its docketing determination, also would not be entitled to any less, either by virtue of the information being publicly available in the agency's licensing docket (or otherwise publicly accessible in its ADAMS document management system) or via an appropriate protective order in the case of any docketed non-public information.<sup>9</sup> See, e.g., Oklo, Inc.; Oklo Power LLC, 85 Fed. Reg. 39,214, 39,214, 39,216–18 (June 30, 2020) (detailing procedures by which potential parties to a hearing on a license application can access public and non-public information relating to the docketed application).

While in this instance the access afforded BREDL to SNC documentary material seemingly was in accord with agency regulatory procedures and the Staff's own review process guidance,<sup>10</sup> for the hearing opportunity afforded "interested persons" by the Atomic Energy Act to remain meaningful, it also is apparent that the Staff must continue to "turn square corners" in

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<sup>9</sup> It remains true, of course, that following application docketing any additional applicant-submitted information received and docketed by the agency prior to completion of the adjudicatory proceeding generally would be eligible for consideration in the context of a new or amended contention submitted pursuant to 10 C.F.R. § 2.309(c), or as evidentiary hearing support in connection with an admitted contention.

<sup>10</sup> Agency caselaw indicates that a Staff docketing decision, which presumably includes its conclusion about how much applicant information the Staff requires to reach that determination, is one for which the Staff is afforded considerable discretion. See, e.g., Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 444 & n.138 (2008) (citing Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (1998); Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395–96 (1995); New England Power Co. (NEP Units 1 and 2), LBP-78-9, 7 NRC 271, 280–81 (1978)); Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 743 & n.14 (2005) (citing NEP, LBP-78-9, 7 NRC at 280)). At the same time, as the Staff's own license application acceptance guidance suggests, see supra notes 6–7 and accompanying text, a Staff decision to docket an application that contained no analysis of the legal/technical basis for a licensing request, and thus no documentary basis for interested persons to assess the adequacy of the application, would sorely test the boundaries of such Staff discretion, as presumably would a change in the Staff's docketing process guidance that, through the use of portal technology or otherwise, sought to limit petitioner access to relevant applicant information needed by the Staff to make a docketing determination.

ensuring hearing requestors have appropriate access to applicant information provided to the agency for use in the license application review process.<sup>11</sup>

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<sup>11</sup> Charlissa C. Smith (Denial of Senior Reactor Operator License), LBP-13-3, 77 NRC 82, 97 & n.76 (2013) (citing St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (“It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.”)).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
Southern Nuclear Operating Company ) Docket No. 52-025-LA-3  
 )  
(Vogtle Electric Generating Plant, Unit 3) )  
 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Intervention Petition and Terminating Proceeding) (LBP-20-08)** have been served upon the following persons by Electronic Information Exchange.

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**MEMORANDUM AND ORDER (Denying Intervention Petition and Terminating Proceeding)  
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Dated at Rockville, Maryland,  
this 10<sup>th</sup> day of August 2020.

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Office of the Secretary of the Commission